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No. 03-

IN THE

Supreme Court of the United States

AMERICAN TELESERVICES ASSOCIATION, MAINSTREAM MARKETING SERVICES, INC., AND TMG MARKETING, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI VOLUME I

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QUESTIONS PRESENTED

1. Whether the First Amendment permits the government to impose regulations that discriminatorily restrict commercial speech in order to serve an asserted interest unrelated to the commercial nature of the speech.

2. Whether the national "do-not-call" registry satisfies intermediate First Amendment scrutiny where the rules specifically exempt, or are inapplicable to, political, charitable and other noncommercial callers, as well as certain commercial telemarketers, and where less restrictive regulations already empower consumers to block unwanted calls.

3. Whether the requirement that commercial telemarketers pay certain fees as a pre-condition for making calls operates as an unlawful tax on protected speech.

PARTIES TO THE PROCEEDINGS

This Petition seeks review of two cases that were consolidated in the United States Court of Appeals for the Tenth Circuit. In the first case, *Mainstream Marketing Services, Inc. v. Federal Trade Commission,* No. 03-1429, Petitioners American Teleservices Association, Mainstream Marketing Services, Inc., and TMG Marketing, Inc. are plaintiffs-appellees. The defendant-appellant, and the Respondent here, is the Federal Trade Commission ("FTC").* The United States also intervened in the matter. In the second case, *Mainstream Marketing Services, Inc. v. Federal Communications Commission*, No. 03-9571, Petitioners named above are the petitioners. The Respondents here, as below, are the Federal Communications Commission ("FCC") and the United States.

RULE 29.6 STATEMENT

Each of the Petitioners states that it has no parent company and no publicly held company owns more than ten percent of its stock.

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* In the district court where review of the FTC rules originated, the following individuals initially were named defendants in their official FTC capacities: Timothy J. Muris, Chairman; Sheila F. Anthony, Commissioner; Mozelle W. Thompson, Commissioner; Orson Swindle, Commissioner; Thomas B. Leary, Commissioner; J. Howard Beales, III, Director, Bureau of Consumer Protection. In an amended complaint, the filing of which the FTC consented to, Petitioners dismissed these individuals, and the Tenth Circuit decision for which review is sought lists them only as "defendants," and not "defendant-appellants." Accordingly, the individual former defendants are not parties to the current proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Mainstream Marketing Servs., Inc. v. Federal Trade Comm'n*, Nos. 03-1429 & 03-9571.

OPINIONS BELOW

The Court of Appeals' opinion in the consolidated appeals at issue here is reported at 358 F.3d 1228 (10th Cir. 2004), App. 1a-38a, and its earlier opinion granting a stay pending appeal is reported at 345 F.3d 850 (10th Cir. 2003). App. 39a-57a. The District Court's decision in *Mainstream Marketing Services, Inc. v. Federal Trade Commission* is reported at 283 F.Supp.2d 1151 (D. Colo. 2003), App. 80a-112a, and its decision denying the FTC's request for a stay is

reported at 284 F.Supp.2d 1266 (D. Colo. 2003). App. 61a-79a. The FTC order in *Amended Telemarketing Sales Rule* is reported at 68 Fed. Reg. 4580 (2003), App. 159a-575a, and the order in *Amended Telemarketing Sales Rule Fees* is reported at 68 Fed. Reg. 45134 (2003). App. 113a-158a. The FCC order in *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* is reported at 18 FCC Rcd. 14014 (2003). App. 585a-857a.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on February 17, 2004. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Relevant statutory and regulatory provisions are reproduced at App. 949a-1023a.

STATEMENT OF THE CASE

This case is a cautionary example of what happens when federal agencies allow perceived political imperatives to override constitutional concerns. Since 1992, the FCC, later joined by the FTC, had company-specific "do-not-call" rules requiring telemarketers to honor individual requests to discontinue calling. The vast majority of telemarketers followed these rules, and most consumers who used them found they were effective in limiting the number of calls they received. Unfortunately, most people were not aware of the rules since neither agency ever publicized or enforced them.

Notwithstanding widespread public ignorance and lack of agency enforcement of the company-specific "do-not-call" rules, the FTC announced in late 2001 that it intended to adopt a national "do-not-call" registry ("DNCR") as part of a

new "privacy agenda." It adopted rules implementing the DNCR in December 2002, just as the FCC was conducting a rulemaking on the subject. The FCC followed the FTC and adopted DNCR rules in July 2003. Under the FTC and FCC rules, once a consumer signs up for the registry, a blanket preemptive ban is imposed on certain commercial telemarketers as designated by the government. At the same time they adopted these rules, however, the agencies also reaffirmed that company-specific rules can be effective. The public enthusiastically supported the DNCR that—unlike the company-specific rules – is now widely promoted.

However, as the District Court found, the DNCR violates basic First Amendment principles by singling out commercial speech for special burdens without any justification for treating such speech differently than charitable, political, or other noncommercial speech. The discriminatory restrictions are particularly egregious because both the FTC and FCC concluded that all telemarketing calls, regardless of their subject, have an identical impact on privacy. The DNCR also fails this Court's First Amendment test for upholding regulations that restrict truthful commercial speech about lawful products, and it imposes an unlawful tax on speech.

A. Statutory and Regulatory Background

The DNCR is the product of two federal agencies acting pursuant to two different federal laws.

1. The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101, *et seq.* ("Telemarketing Act"), authorizes the FTC to promulgate rules prohibiting "deceptive telemarketing . . . and other abusive telemarketing acts." *Id.* § 6102(a)(1). Though it adopted company-specific "do-not-call" rules mirroring FCC rules (described below) that were already in place, the FTC through 2000 used its Telemarketing Act authority almost exclusively to regulate telemarketing "fraud," a problem it considered

entirely distinct from "unwanted calls" made by legitimate telemarketers. *The Know Your Caller Act of 1999 and the Telemarketing Victim Protection Act of 1999: Hearing on H.R. 3100 and H.R. 3180 Before the House Comm. on Commerce Subcomm. on Telecommunications, Trade, and Consumer Protection,* 106th Cong. 20, 27 (2000) (only about ten percent of the telemarketing complaints the FTC receives concern unwanted calls).

The earlier adopted Telephone Consumer and Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), authorized the FCC to address the issue of unwanted telemarketing calls and directed the agency to consider whether unsolicited charitable and political calls should be regulated as well. *Id.* § 227(c)(1)(D). In initially implementing this law, the FCC declined to create any blanket "do-not-call" registry, and instead adopted company-specific rules in order to preserve a balance between First Amendment rights and an interest in privacy. In an earlier review of this issue the FCC had taken the position that "all solicitation calling—whether for charitable, political, or business purposes—involves similar privacy implications" and that any "do-not-call" registry that focused on commercial telemarketing would "raise serious constitutional questions [absent] significant practical differences between unsolicited commercial and noncommercial calls." *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980). When it adopted company-specific "do-not-call" rules, the FCC noted that any rule prohibiting all commercial telemarketers from contacting a consumer would frustrate consumers' "ability to choose among those . . . from whom they do and do not wish to hear." *Rules and Regulations Implementing the Telephone Consumer Protection Act,* 7 FCC Rcd. 8752, 8761, 8766 (1992).

The agencies did virtually nothing to publicize consumers' rights under these initial rules to block unwanted calls—and even less to enforce the company-specific rules. From 1992

to 2003, the FCC issued only one decision that involved a violation, and in that lone case found only two calls that contravened a "do-not-call" request. *See Consumer.Net v. AT&T Corp.*, 15 FCC Rcd. 281, 288-89, 295-99 (1999). As noted, the FTC focused on different issues involving telemarketing fraud, and pursued alleged "do-not-call" violations only as a rare afterthought.

2. In December 2002 the FTC adopted new rules for creating and enforcing a DNCR even though the record showed most consumers had been unaware of the company-specific rules. For example, one nationwide survey presented to the FTC indicated less than five percent of consumers were aware of the right to block unwanted calls. *Telemarketing Sales Rule "Do-Not-Call Forum*, Matter No. P994414, at 93 (Jan. 11, 2003).

When it became clear the FTC was intent on adopting rules implementing a DNCR, the FCC also launched a rulemaking to revise its rules under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459 (2002). App. 858a-947a. In doing so, it noted that it had received over 11,000 TCPA complaints in the previous two years. However, after being presented with data that approximately two-thirds of the complaints had nothing to do with unwanted calls, the FCC acknowledged "the increasing number of inquiries and complaints about telemarketing practices should not form the basis upon which we revise or adopt new rules under the TCPA." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14140 (2003). App. 799a-800a. Instead, it interpreted a congressional directive to consult with the FTC and "maximize consistency" between the respective agencies as a command to replicate the FTC rules. *Id.* at 14033, 14059. App. 617a, 663-664a.

The FCC and FTC "do-not-call" rules prohibit certain commercial telemarketers from calling consumers listed on the

DNCR unless the telemarketer has obtained express prior written consent from, or has an "established business relationship" with, the called party. 47 C.F.R. §§ 64.1200(c), (f)(9)(i)-(ii); 16 C.F.R. § 310.4(b)(1)(iii)(B). The rules do not restrict political calling of any nature, by any person or entity, nor do they limit charitable solicitations that come from in-house callers, calls to conduct market research, and calls from non-charitable non-profit entities. The DNCR also exempts charitable solicitations by for-profit fundraisers, but such calls are subject to the company-specific rules. 16 C.F.R. § 310.6(a); *Amended Telemarketing Sales Rule* ("*Amended Rule*"), 68 Fed. Reg. 4580, 4584-85, 4587, 4636-37 (2003). App. 178a-181a, 189a-190a, 394a-396a.

The FTC explained its decision to distinguish between commercial and charitable calls on legal rather than evidentiary grounds, taking the position that the First Amendment extends "a higher degree of protection . . . to charitable solicitation than to commercial solicitation." *Id.* at 4586. App. 185a. Citing comments that "charitable fundraising is fully protected speech, and that attempts to regulate it are subject to the highest level of scrutiny," the FTC expressed confidence the restrictions placed on commercial telemarketers would be subject to—and would survive—reduced scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980). 68 Fed. Reg. at 4635. App. 387a-389a. The FCC employed the same analysis to reach an identical conclusion. 18 FCC Rcd. at 14052, 14059. App. 651a-652a, 661a-663a.

The agencies did not seriously defend their disparate treatment of commercial and noncommercial calls on the basis of any different privacy impact. Indeed, the FTC candidly echoed the FCC's earlier finding that "the encroachment upon consumers' privacy rights by unsolicited calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to

make a sale or to ask for a charitable contribution." *Amended Rule*, 68 Fed. Reg. at 4637, App. 396a; *see also id.* at 4629-30 (discussing privacy issues without distinguishing between commercial and noncommercial callers). App. 365a-369a. The FCC, notwithstanding Congress' initial direction that it study whether "do-not-call" rules should apply equally to noncommercial telemarketers, explicitly decided to "not seek comment on the [DNCR's] exemption as it applies to political and religious speech." 17 FCC Rcd. at 17479. App. 896a. Nor did the agencies try to justify the commercial-noncommercial distinction based on demonstrable differences in compliance. The FTC acknowledged it had no "experience" concerning whether commercial telemarketers ignore "do-not-call" requests more often than noncommercial callers. *Id.* at 4637. App. 396a-398a.

3. Congress retroactively authorized funding for the "do-not-call" registry, *see* Do-Not-Call Implementation Act, Pub. L. No. 108-10, 7 Stat. 557 § 2 (2003), App. 949a-952a, since the FTC had enacted rules before it had budgeting. The FTC first estimated it would cost $5 million to administer the DNCR, but later revised that to $18.1 million, a sum representing more than 10 percent of the agency's overall annual budget. After being granted authority for the entire $18.1 million, the FTC hired a contractor to create and administer the DNCR for $3.5 million while earmarking the remainder to upgrade computer systems used to respond generally to fraud-related complaints. *Amended Telemarketing Sales Rule Fees* ("*Amended Fees Rule*"), 68 Fed. Reg. 45134, 45141 (2003). App. 113a, 142a-145a.

Congress authorized the FTC to recoup the $18.1 million by charging commercial telemarketers fees in conjunction with the DNCR. Commercial telemarketers wishing to place calls to consumers who did not place their numbers on the DNCR must pay an annual registry fee before placing any outbound telephone calls. 16 C.F.R. § 310.8(a)-(b). The fee

currently is $25 for every area code in which telemarketers wish to place calls, up to a cap of $7,375, but there is no charge for the first five area codes and charitable and political telemarketers may obtain the DNCR free of charge.[1]

B. Procedural History

1. Immediately after the FTC rules appeared in the Federal Register, Petitioners filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Colorado alleging, *inter alia,* that the DNCR violates the First Amendment. The District Court agreed, applying *Central Hudson* to determine that neither of the interests asserted by the government justified creating the DNCR. Specifically, the court found the DNCR does not legitimately advance the government's interest in protecting privacy because "unwanted calls seeking charitable contributions are as invasive to [] privacy . . . as unwanted calls from commercial telemarketers," 283 F.Supp.2d at 1166, App. 103a, and regulations may not distinguish between commercial and noncommercial speech if both have the same effect on the asserted interest. *Id.* at 1165-68 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)). App. 101a-106a. The court dealt similarly with the government's asserted interest in preventing "abusive and fraudulent" telemarketing practices, finding "there is no evidence in the administrative record or before this court that abusive and fraudulent telemarketing practices are more often instigated by commercial telemarketers than by charitable telemarketers." *Id.* at 1167. App. 104a. The District Court later denied the FTC's request for a stay, again rejecting the FTC's

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[1] *Id.* § 310.8(c). The FTC recently proposed, after scarcely more than six months' experience with the DNCR, to raise fees to $45 per area code, capped at $12,375, having found that more entities than expected gain free access to the registry under the noncommercial and small scope (five area codes or fewer) exceptions, while fewer entities than expected pay for full access. *Telemarketing Sales Rule Fees*, 69 Fed. Reg. 23701 (2004).

assertion that its interest in preventing "abusive telemarketing practices" justified the DNCR, and explaining "*the FTC has gathered no evidence*" regarding whether commercial telemarketers are more likely than noncommercial telemarketers to ignore company-specific "do-not-call" requests. 284 F.Supp.2d at 1173 (emphasis original). App. 71a.

2. After the FCC rules appeared in the Federal Register, Petitioners sought review in the United States Court of Appeals for the Tenth Circuit, alleging that the rules violate, *inter alia*, the First Amendment. At the same time, Petitioners requested that the FCC stay the effectiveness of its new rules during judicial review. The FCC denied the request shortly thereafter, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 16973 (2003), App. 582a, and Petitioners promptly filed a motion with the Tenth Circuit for expedited stay pending appeal, which that court denied. *Mainstream Mktg. Servs., Inc. v. FCC*, No. 03-9571, Order (10th Cir. Sept. 26, 2004). App. 58a-60a. Petitioners then filed an application to stay the rules with the Circuit Justice, but the application was denied.

3. The Tenth Circuit consolidated both actions, as well as two others challenging the FTC and FCC "do-not-call" rules.[2] It also stayed the decisions invalidating the rules. 345 F.3d 850. App. 39a-57a. It ultimately upheld the DNCR in its entirety, holding that, under *Central Hudson*, the interest in

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[2] A different set of plaintiffs also challenged the FTC rules in another district, and the court invalidated them on grounds the FTC lacked statutory authority. *See U.S. Security v. FTC*, 282 F.Supp.2d 1285 (W.D. Okla. 2003). The Tenth Circuit reversed that decision in part on the basis of intervening congressional legislation. 358 F.3d at 1250. App. 37a. Similarly, a different entity, the Competitive Telecommunications Association, challenged the FCC rules on grounds the DNCR's established business relationship exception gives incumbent telecommunications providers too great an advantage and is inconsistent with Communications Act. The Tenth Circuit rejected that challenge. *Id.* at 1248-50. App. 33a-36a. None of these parties are petitioners here.

protecting individual privacy and preventing telemarketing abuse justified the new rules. The Tenth Circuit rejected the District Court's reading of *Discovery Network* and held it is immaterial whether unrestricted noncommercial speech affects privacy in the same way as the commercial speech banned by the rules. The court reasoned that *Discovery Network* merely held that "a regulation that has only minimal impact on the identified problem cannot be saved simply because it targets commercial speech," 358 F.3d at 1245, App. 28a, and "so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal." *Id.* at 1239. App. 16a.

Although deceptive and abusive practices are not the subject of the "do-not-call" rules or relevant to this challenge, the Tenth Circuit asserted "commercial callers are more likely than non-commercial callers to engage in deceptive practices." *Id.* at 1241. App. 20a. The court based this conclusion solely on what the FTC perceived to be the "incentives" of various types of telemarketers. However, that agency neither sought nor cited actual evidence of higher abuse in the commercial context. *Id.* It also failed to discuss the more direct relevance of other Telemarketing Act rules that are not the subject of this case. Finally, the Tenth Circuit rejected the challenge to the "do-not-call" registry fees. *Id.* at 1247-48. App. 30a-33a.

REASONS FOR GRANTING THE WRIT

This Court should grant review in order to decide whether it is constitutional for the government to discriminate against truthful commercial speech simply because it is commercial where the alleged harm is the same for all speech. Specifically, this case raises the question of whether the government has greater authority to restrict what it presumes to be "unwanted speech" if the speech is commercial rather than non-commercial. The Tenth Circuit's misuse of commercial speech doctrine to advance a distinctly noncommercial

interest highlights a major doctrinal issue this Court has reserved several times in recent cases, most notably in *Discovery Network*. The DNCR blocks commercial calls despite a lack of persuasive evidence that they intrude on residential tranquility any differently from any other unsolicited calls, solely because the government concluded it has greater latitude—both politically and constitutionally—to regulate commercial speech. Contrary to the Tenth Circuit's assumption, the DNCR does not reflect individual preferences regarding "unwanted" calls, since the government decided for consumers which calls the registry would block. Review by this Court also is essential to consider whether the Tenth Circuit properly construed this Court's jurisprudence under *Central Hudson* and its progeny, and whether the government may impose a fee that operates as a tax on speech.

I. THE COURT SHOULD GRANT REVIEW BECAUSE THIS CASE PRESENTS A SIGNIFICANT DOCTRINAL QUESTION OF COMMERCIAL SPEECH ON WHICH GUIDANCE IS NEEDED

A. There is a Growing Trend Toward Regulating Commercial Speech in the Name of Privacy

This case arises from a recent trend among governmental entities to restrict commercial speech discriminatorily in the name of privacy. Technological advancements making direct communication with consumers more efficient, cost-effective and precise have spurred a trend toward increased federal and state regulation of marketing communications. Regulations such as the DNCR do not merely restrict the ability to market directly to consumers telephonically; rather they have the potential to eliminate an entire channel of communication.

Creation and enforcement of the DNCR is but one of many ways the government is inserting itself between businesses and individuals. In addition to the federal DNCR, most states

have established "do-not-call" lists—some even after creation of the DNCR—virtually all of which single out commercial speech.[3] As a result, several lower courts are presented with issues similar to those raised here.[4] The government also is actively considering the merits of a "do-not-email" registry modeled on the DNCR, which would target commercial email. *Definition, Implementation and Reporting Requirements Under the CAN-SPAM Act*, 69 Fed. Reg. 11776 (2004). Courts already are confronting the constitutional issues arising from such regulation.[5] Whatever policy arguments may be advanced for or against such laws, they necessarily raise important constitutional questions that lie at the heart of this Petition.

B. Asserted Privacy Interests Do Not Implicate the Commercial Speech Doctrine

1. *Privacy is the Only Relevant Interest that the DNCR Purports to Serve*

The government rests its constitutional defense of the DNCR on application of the commercial speech doctrine, yet the interests it purports to serve are not germane. The Tenth Circuit erroneously identified the government's interests as (1) protecting residential privacy and (2) protecting consumers from the risk of fraudulent or abusive solicitation. 358 F.3d at 1237. App. 13a-14a. However, the "do-not-call" issue is entirely unrelated to questions of consumer fraud and

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[3] *See, e.g.*, 18 FCC Rcd. at 14024 nn.44-45. App. 602a-603a. *See also, e.g.*, N.C. Gen. Stat. §§ 75-101, 75-103; Va. Code Ann. 59.1-510, 59.1-514.

[4] *See e.g., Colorado Citizens for Free Speech v. Gifford*, No. 02-RB-1192 (D. Colo.); *Fraternal Order of Police v. Stenehjem*, 287 F.Supp.2d 1023 (D. N.D. 2003). *Cf. National Fed'n of the Blind v. FTC*, No. 04-1378 (4th Cir.).

[5] *E.g., White Buffalo Ventures, LLC v. University of Texas at Austin*, No. A-03-CA-296-SS (W.D. Tex. Mar. 22, 2004).

abuse that are addressed by other statutory sections and regulations not at issue here.[6] This challenge to the DCNR involves *only* restrictions imposed on truthful, non-misleading speech about lawful products. If that were not the case, the *Central Hudson* test would not apply at all, to whatever extent it is appropriate in this case.

The Tenth Circuit's confusion on this point arose from the fact that the DNCR was the product of two federal agencies construing two different laws. The Telemarketing Act, under which the FTC acted, does not mention the "do-not-call" issue at all and focuses almost entirely on issues of fraud. For that reason, the United States District Court for the Western District of Oklahoma held that the FTC exceeded its statutory authority in adopting the DNCR.[7] The TCPA, on the other hand, specifically authorized the FCC to adopt "do-not-call" rules, but was predicated on "the legitimacy of telemarketing industry." *See Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd. 8752, 8753 (1992). It directed the FCC to ensure that any "do-not-call" regulations maintain an appropriate balance between commercial interests and privacy concerns while meeting constitutional standards.[8] Regardless of how one frames the

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[6] *See* 16 C.F.R. §§ 310.3, 310.4(a), 310.4(b)(1)(i), 310.4(c)-(e); 47 C.F.R. §§ 64.1200(b)-(c)(1), 64.1200(d)(4). *See also* 18 U.S.C. §§ 2325-2327.

[7] *U.S. Security*, 282 F.Supp.2d at 1290-92 (Telemarketing Act did not empower FTC to adopt DNCR). As originally enacted, the Act was concerned with "unscrupulous activities from which no one benefits but the perpetrator" and sought "equitable balance between . . . stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses." H. REP. 103-20 at 4, 1993 U.S.C.C.A.N. 1626, 1629. The *U.S. Security* decision, however, was rendered moot after Congress retroactively ratified the DNCR. 358 F.3d at 1250. App. 37a.

[8] Senate Report (Commerce, Science and Transportation Committee) No. 102-177, Oct. 8, 1991, at 6-7 ("The legislation directs the FCC to

privacy issue, however, it is not a question that implicates the commercial speech doctrine.

2. *The Asserted Privacy Interest Has Nothing to Do With Commercial Speech*

This Court has emphasized that the First Amendment "includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Although it has recognized residential tranquility as a legitimate governmental concern, [9] this Court has never held that an interest in avoiding unwanted speech is different or more important when the speaker is seeking to communicate a commercial message as distinguished from a noncommercial one. Thus, in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983), the Court invalidated a restriction on mailing unsolicited contraceptive advertisements designed "to protect those recipients who might potentially be offended." At bottom, the interest in shielding "unwilling listeners" is the same regardless of whether speech is commercial, political or charitable. In all instances, regulations intended to protect privacy must be

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balance individual privacy rights . . . and commercial freedoms of speech and trade. The Committee expects the Commission will issue regulations that protect subscribers' privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker.").

[9] Past decisions have emphasized that the balance between the interests of would-be speakers and their intended listeners is delicate. *E.g.*, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 163 (2002) ("there must be a balance between these interests and the effect of the regulations on First Amendment rights"); *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n*, 447 U.S. 530, 537, 541 (1980) (striking down restriction on billing inserts based on asserted need to protect residential privacy interests); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975).

both narrow *and* neutral. *Hill*, 530 U.S. at 723 (upholding restriction on "sidewalk counselling" because it "applies equally to used car salesmen, animal rights activists, fund-raisers, environmentalists and missionaries"); *Discovery Network*, 507 U.S. at 428 ("prohibition against the use of sound trucks emitting loud and raucous noise is permissible if it applies *equally* to music, political speech *and advertising*") (emphasis added); *Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) (regulation denied government ability "to vary the sound quality or volume based on the message being delivered"); *Carey v. Brown*, 447 U.S. 455, 465 (1980) ("nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy").

The Tenth Circuit held that the DNCR is a valid restriction on commercial speech because consumers themselves decide to place their phone numbers on the registry. 358 F.3d at 1242. App. 21a-22a. According to the court below, the only speech that is blocked is—by definition—unwanted. But this conclusion is not supported by the commercial speech doctrine and it seriously mischaracterizes both the record and decisions of this Court on which the Tenth Circuit relied. In *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 734 (1970), for example, the Court upheld a postal regulation that operates almost exactly like the company-specific requirements (and unlike the DNCR) because it allowed the addressee "complete and unfettered discretion in electing whether . . . he desired . . . further material from a particular sender." As the District Court pointed out, the government through the DNCR selects which callers are prohibited from speaking to those who place their numbers on the registry. *See* 283 F.Supp.2d at 1163 ("mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice"). App. 98a. Similarly, in *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943), this Court struck down a ban on door-to-door solicitation because it "substitute[d] the judgment of the community for the judgment of the individ-

ual householder." While the *Martin* Court indicated homeowners could erect "no solicitation" signs without violating the Constitution, the ordinance would have offended the First Amendment if it permitted residents only to erect "no solicitation" signs that selectively barred speakers disfavored by the town council. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Ultimately, constitutional protection is based on the principle that "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

The Tenth Circuit's assumption that the commercial calls blocked by the DNCR are necessarily "unwanted" because consumers opt in to the registry begs the constitutional question presented here. The FTC specifically acknowledged that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." *Amended Rule*, 68 Fed. Reg. at 4637. App. 396a-397a. Likewise, the FCC has found "all solicitation calling—whether for charitable, political, or business reasons—involves similar privacy implications" and that there is no evidence to show "subscribers would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation." *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1035.

Whether a particular call is or is not welcome depends not on its commercial or non-commercial nature but on the interests of the individual telephone subscriber, which the government should not presume to supplant. As this Court has explained, a "'consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995) (quoting *Virginia Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)). The

question then, is whether the government may use commercial speech doctrine to presume which calls a consumer would prefer to receive.

C. The Court Should Articulate Clear Rules for When Government Can Impose Special Burdens on Commercial Speech

The essence of this case is whether government can single out commercial speech for special regulation simply because it is commercial. When the FTC Chairman announced the DNCR's adoption he forthrightly admitted that his agency proceeded on the assumption that "charities and religions have First Amendment rights that others don't have." Remarks of Chairman Timothy K. Muris, FTC Press Conference, Dec. 18, 2002. The FTC confirmed that its regulations target commercial telemarketers because the agency believes the First Amendment extends "a higher degree of protection . . . to charitable solicitation than to commercial solicitation." 68 Fed. Reg. at 4586. App. 185a. The FCC declined even to receive comments on noncommercial calls, 17 FCC Rcd at 17479, App. 896a, and both agencies assumed the DNCR rules would need to satisfy only the relaxed scrutiny of *Central Hudson*. 68 Fed. Reg. at 4635; App. 387a-389a; 18 FCC Rcd. at 14052, 14059. App. 651-652a, 661a-663a.

Although the Court has raised this issue in various cases, it has not definitively resolved whether the government has the same leeway in regulating commercial speech when it seeks to advance interests unrelated to whether the "harm" involved flows from the commercial nature of the speech. The most directly focused examination of the issue came in *Discovery Network*, where a city banned commercial but not noncommercial newsracks from public property based on its stated interest in preserving esthetics and safety. This Court held the law was "an impermissible means of responding to th[ese] admittedly legitimate interests" because it "place[d] too much importance on the distinction between commercial

and noncommercial speech." 507 U.S. 424. Even if "every decrease in the number of [newsracks on public property] necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape," this Court explained, that did not justify singling out commercial newsracks because they "are no more harmful than the permitted [noncommercial] newsracks, and have only minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418.

Despite that finding, *Discovery Network* "expressly reserve[d] the question whether regulations *not directed at the content of commercial speech or adverse effects stemming from that content* should be evaluated under the standards applicable to regulations of fully protected speech." *Id.* at 436 (Blackmun, J., concurring) (emphasis added). Because the city's law failed *Central Hudson*'s intermediate scrutiny test, the *Discovery Network* Court did not decide whether "more exacting review" should apply when the government regulates commercial speech for a noncommercial reason, such as esthetics or public safety. *Id.* at 416 n.11.

Subsequent decisions have utilized similar reasoning and continued to leave this issue open. In *Rubin*, this Court examined a regulation prohibiting the printing of alcohol content on beer labels in order to impede brewers' "strength wars." While Justice Stevens would have ruled squarely that *Central Hudson* should not apply where a regulation "neither prevents misleading speech nor protects consumers from . . . incomplete information," 514 U.S. at 491-92 (Stevens, J., concurring), the remainder of this Court found the regulation invalid under *Central Hudson* and thus deemed it unnecessary to consider whether this type of a restriction "might be tolerated in the commercial speech area" in situations where it would not ordinarily be permitted. 514 U.S. at 482.

The next year, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), this Court invalidated a state law that

prohibited the advertising of liquor prices but again left unresolved the ultimate applicability of *Central Hudson* to such a restriction on truthful, nonmisleading speech. A three-justice plurality stated, "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *Id.* at 501. It added that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* A four-justice plurality added that this Court reviews a restriction on commercial speech that "serves an end unrelated to consumer protection" with "special care, mindful that speech prohibitions of this type rarely survive constitutional review." *Id.* at 504 (quotation and citation omitted). Justice Thomas concurred in the judgment on the ground that a governmental interest in suppressing truthful, nonmisleading speech "can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." *Id.* at 518. Justice Scalia also expressed "discomfort" with the *Central Hudson* test, but since he agreed the law at issue failed even that test, he found it unnecessary to go further. *Id.* at 517-18 (Scalia, J., concurring in part and concurring in the judgment).

In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999), this Court again invalidated a governmental restriction on truthful, nonmisleading commercial speech and again reserved the question whether a test stricter than *Central Hudson* ought to apply. More recently, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001), this Court struck down yet another such law under *Central Hudson* while acknowledging "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases." Justice Kennedy, joined by Justice Scalia, wrote separately to

note "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech." *Id.* at 572 (concurring in part and concurring in the judgment).

In *Discovery Network* itself, Justice Blackmun warned that unless this Court made clear that *Central Hudson*'s relaxed scrutiny applies only to commercially motivated restrictions on commercial speech, "*Central Hudson*'s chickens [would] come home to roost."[10] This is exactly what happened in the Court of Appeals here. The Tenth Circuit's decision allows the government to single out and regulate truthful, non-misleading commercial speech in order to protect people from "unwanted [telephone intrusions] into their homes," 358 F.3d at 1245, App. 27a, a governmental interest that is wholly unrelated to preserving the fair bargaining process and certainly not limited to commercial communications. The decision thus rests squarely on the notion that government may regulate commercial speakers in ways it cannot regulate noncommercial entities.

However, the patchwork of exemptions and selective applications of the DNCR fails even to address whether particular telemarketing calls are accurately classified as "commercial." For example, noncommercial speakers are permitted to make calls to sell products, while commercial callers who want only to promote a positive public image are banned.[11] Similarly, commercial calls to sell newspapers and

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[10] 507 U.S. at 436 (Blackmun, J., concurring). Earlier, the Chief Justice warned that the Court's treatment of this issue was "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Metromedia v. City of San Diego*, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

[11] *See* 16 C.F.R. §§ 310.2(bb), (cc), 310.4(b)(1)(iii)(A), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), (f)(6)-(7), (f)(9)(iii). *See also* 18 FCC Rcd. at 14089. App. 712a. In this respect, this case raises a similar issue to that examined in *Nike v. Kasky*, 539 U.S. 654 (2003), to the extent it addressed

other publications are blocked by the DNCR, though this Court has held the First Amendment fully protects activities to promote circulation. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Such anomalous applications of the rule are inconsistent with this Court's jurisprudence. When the government draws other types of discriminatory speech distinctions (even with respect to otherwise unprotected speech), underinclusiveness is fatal. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 393 (1992) ("fighting words" may not be selectively regulated). Likewise, when government seeks to restrict noncommercial speech in order to protect people from unwanted intrusions, the First Amendment requires the regulation to be both content-neutral and to "target[] and eliminate[] no more than the *exact source* of the 'evil' it seeks to remedy." *Frisby v. Schultz,* 487 U.S. 474, 485 (1988) (emphasis added); *accord Hill,* 530 U.S. at 723, 726-27.

Because the issue presented by this case has not been resolved definitively, various circuit courts differ sharply on the proper application of *Discovery Network.* Like the District Court below, a number of appellate courts have interpreted *Discovery Network* as holding that even if banning a certain type of commercial speech would substantially advance a legitimate governmental interest, "it is unconstitutional to ban commercial speech but not noncommercial speech . . . absent a showing that the commercial speech has worse secondary effects." *Rappa v. New Castle County*, 18 F.3d 1043, 1074 n.54 (3d Cir. 1994); *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998) ("we cannot say that the difference in value between commercial speech and noncommercial speech is as great as it was before *Discovery Network*"); *Outdoor Sys., Inc. v. City of Mesa,* 997 F.2d 604,

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when a commercial entity's speech may be subject to lesser First Amendment protection. Although certiorari in that case ultimately was dismissed as improvidently granted, the important reasons why review was granted in the first instance remain fully relevant.

610-11 (9th Cir. 1993) (the "principle enunciated in *Discovery Network*" is that government may not "discriminate between commercial and noncommercial speech" based on esthetics or safety); *accord Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (striking down preferential "safe harbor" that barred commercial broadcasters but not noncommercial broadcasters from airing "indecent" programs during certain hours because *Discovery Network* forbids government from "imposing different restrictions on each of two categories of [speakers] while failing to explain how this disparate treatment advance[s] its goal").

Here, the Tenth Circuit marginalized the reasoning in *Discovery Network* as if it were nothing more than a specialized application of *Central Hudson*. 358 F.3d at 1246. App. 28a-29a. Accordingly, this Court should use this case to clarify that more exacting scrutiny applies to government restrictions on truthful, nonmisleading commercial speech, at least when the government does not even "assert[] an interest in preventing commercial harms," *Discovery Network*, 507 U.S. at 426, or in "preserv[ing] a fair bargaining process." *44 Liquormart*, 517 U.S. at 501 (plurality opinion).

II. THE TENTH CIRCUIT MISCONSTRUED *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY TEST

Under *Central Hudson*, a restriction on commercial speech satisfies the First Amendment only if it directly and materially advances a substantial interest and is narrowly tailored to avoid restricting more speech than necessary. *Central Hudson*, 447 U.S. at 564. This Court has ruled that the government's burden of proof "is not satisfied by mere speculation or conjecture; rather, a body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real" and the regulation will advance the interest in a direct and material way. *Edenfield*, 507 U.S. at

770-71. "[A]necdotal evidence and educated guesses" are insufficient. *Rubin,* 514 U.S. at 490.

Contrary to the District Court's ruling and this Court's *Central Hudson* jurisprudence, the Tenth Circuit held that the DNCR sufficiently advanced the asserted interests. Review by this Court is thus warranted to correct the Tenth Circuit's misreading of the commercial speech cases. Such review is all the more important to keep "the starch in the standards" where, as here, "the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 774 (1996) (Souter, J. concurring).

A. The Tenth Circuit Misconstrued the "Material Advancement" Requirement

This Court has made clear in various commercial speech cases that "exemptions and inconsistencies bring into question [a law's] purpose," thereby precluding it from directly and materially achieving its objectives. *Rubin*, 514 U.S. at 489; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 189. Nevertheless, despite exemptions for noncommercial calling, including political and charitable calls, as well as commercial calls under certain circumstances, the Tenth Circuit upheld the DNCR. It did so even while acknowledging that "[i]t is unclear from the record exactly how many telemarketing calls will be blocked by the do-not-call regulations." 358 F.3d at 1240 n.11. App. 18a. The District Court went even further in its characterization of the paucity of evidence, pointedly rejecting the government's estimate as a figure that "has crescendoed through the course of this lawsuit and taken on a life of its own with no reference to the factual record." 284 F.Supp.2d at 1269. App. 65a. It concluded "[t]here is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's *ipse dixit*, to support this amalgam." *Id.*

The Tenth Circuit's conclusion that the government's showing was sufficient to satisfy *Central Hudson* is based on a misreading of this Court's decisions. It read *Discovery Network* as standing only for a minimal-impact principle—namely, that "a regulation that has only minimal impact on the identified problem cannot be saved simply because it targets commercial speech." 358 F.3d at 1245. App. 28a. The Tenth Circuit thus inferred, relying primarily on *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), that "so long as a commercial speech regulation materially furthers its objectives" by applying to a substantial portion of the type of speech at issue, "underinclusiveness is not fatal under *Central Hudson*." 358 F.3d at 1239. App. 16a. The court reasoned that the DNCR's ban on commercial telemarketing speech—in contrast to the newsrack regulation in *Discovery Network*—applies to a "substantial" percentage of all telemarketing speech, and therefore satisfies *Central Hudson*, regardless of whether commercial calls are more "invasive of privacy" than noncommercial calls. *Id.* at 1240, 1244. App. 18a, 25a.[12]

Contrary to the Tenth Circuit's reasoning, the decision in *Edge*, which came three months after *Discovery Network*, did not in any way dilute the prohibition against banning only

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[12] The Tenth Circuit noted at a different point in its opinion that "the do-not-call registry's commercial/noncommercial distinction was based on findings that commercial telephone solicitation was significantly more *problematic* than charitable or political fundraising calls." *Id.* at 1241. App. 19a (emphasis added). But the only support the court cited for such "findings" was a single page from a single House Report that predated the DNCR rules by 12 years—a wholly inadequate basis in a legislative record upon which to draw distinctions that affect First Amendment rights. *Compare, e.g., Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196-213 (1997). Significantly, the District Court found—and the Tenth Circuit did not dispute—that "unwanted calls seeking charitable contributions are as invasive to [] privacy . . . as unwanted calls from commercial telemarketers." 283 F.Supp.2d at 1166. App. 103a.

commercial speech when its impact on the asserted interests is no different or more severe than comparable noncommercial speech. Notably, *Edge* did not even concern a distinction between commercial and noncommercial speech, but rather one between two types of advertising. *See, e.g., Anderson v. Treadwell*, 294 F.3d 453, 464 (2d Cir. 2002) (*Edge* applies to challenges of a "distinction *among* categories of commercial solicitations, not between commercial and noncommercial solicitations"). Even so, the distinction among commercial speakers in *Edge* related directly to the interest in "supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries." 509 U.S. at 426; *see also Greater New Orleans*, 527 U.S. at 194-195 & n.8 (*Edge* turned on advancing the government interest in supporting the policy of nonlottery states, not on reducing a portion of "undesirable" communications).[13]

The Tenth Circuit thus misconstrued *Discovery Network* and *Edge* to suggest that a commercial speech regulation that reduces 3 to 4 percent of a given problem is "paltry" but that a solution that addresses 11 percent of the problem represents a "material advancement" of the government's interest. But *Rubin* and *Greater New Orleans Broadcasting* could not have been decided as they were if *Central Hudson* required the government to show only somewhat more than a "paltry" impact on the problem. Like the situation here, each of these cases invalidated commercial speech regulations that were undermined by exemptions, and neither attempted to quantify how much of the problem was left unregulated by the exclusions.

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[13] To the extent *Edge* relied on *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), to suggest the government also had an interest in deterring advertising for a lawful but disfavored product, that principle is no longer good law. *See 44 Liquormart, Inc.*, 517 U.S. at 510 (plurality opinion); *Rubin*, 514 U.S. at 482 n.2, 489-91.

The Tenth Circuit's assumption that any calls blocked by the DNCR serve the government's purpose of preventing "unwanted" calls is not supported by the record. The FTC itself acknowledged the overbroad reach of the DNCR, which blocks all calls in a given category—including calls the consumer "would not mind receiving"—compared with the company-specific approach that precisely reflects individual preferences. 68 Fed. Reg. at 4636. App. 178a. Indeed, the record showed "consumers preferred a 'nuanced approach' to the 'do-not-call' issue, wanting to limit some calls to their household, but not all." *Id.* at 4593. App. at 214a. In this case, however, the agencies affirmatively avoided gathering the evidence needed to support the conclusion that calls blocked by the DNCR accurately reflect individual preferences. *E.g.*, 17 FCC Rcd. at 17479. App. 896a.

B. The Tenth Circuit Misconstrued the "Narrow Tailoring" Requirement

The Tenth Circuit also misconstrued *Central Hudson*'s dictate that if it could "achieve its interests in a manner that . . . restricts less speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002); *see also Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (if "obvious less-burdensome alternatives" would serve its interest as effectively, the government must use them). Under this requirement, the government must "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Lorillard*, 533 U.S. at 561 (internal quotations omitted).

Here, the Tenth Circuit's conclusion that the DNCR was no more burdensome than necessary because it allows consumers to "opt in" to the registry ignored the record. Specifically, the FTC found that applying the DNCR to nonprofits was *not narrowly tailored* because it would not accurately reflect specific consumer preferences. Conversely, it found the

company-specific approach constitutional because there is a "direct correlation between the governmental interest and the regulatory means employed to advance that interest." 68 Fed. Reg. at 4636. App. 393a. The government justified disparate treatment of commercial and noncommercial calls based on "enforcement experience" and on the unsupported assertion that noncommercial callers have different "incentives" to comply with company-specific rules. However, the record reveals the government had no experience with enforcing the company-specific rules, and its assumptions regarding "incentives" were not backed either by evidence or logic. [14]

The Tenth Circuit uncritically accepted the FTC's conclusion that the company-specific rules were too "burdensome" because consumers "must repeat their 'do-not-call' request with every telemarketer" and because "many consumers find even an initial call . . . to be abusive and invasive of privacy." *Amended Rule*, 68 Fed. Reg. at 4629-30 (footnote omitted). App. 365a-369a. Contrary to this conclusion, however, the record showed that the company-specific rules were effective when invoked, and the overall volume of calls did not impose an unreasonable burden. [15] Nor did the

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[14] The FTC cited the unsubstantiated belief of one commenter that commercial telemarketers had a greater "incentive" than noncommercial callers to engage in abusive practices because the latter are interested in cultivating good will. 68 Fed. Reg. at 4637. App. 396a-397a. But the agency never discussed or disputed other record evidence that commercial telemarketers also strive to avoid alienating call recipients who may be potential future customers. *See, e.g.*, FTC File No. 411001, Comments of National Association of Advertisers, Apr. 15, 2002, at 1; Comments of SBC Communications, Inc., Apr. 18, 2002, at 4, ¶ 5.

[15] *E.g.*, *Telemarketing Sales Rule "Rule Review" Forum*, Matter No. P994414, at 7 (June 27, 2000) (National Consumer League comments). Comments cited by both the FTC and FCC filed by consumers who supplied specific data about their actual experiences of keeping logs of their telemarketing calls confirmed the number of calls was far from overwhelming under a company-specific approach. The data, collected over a two- and three-year period, showed that the commenters received,

court explain how the FTC could find that company-specific rules were appropriately tailored to protect consumer privacy in the noncommercial context where the agency had made no effort to determine whether the main concern was associated with commercial or noncommercial calls.[16]

The Tenth Circuit's conclusion also ignores case law holding that providing information about a given problem, and enforcing existing laws, are obvious less restrictive alternatives in any *Central Hudson* analysis. *See 44 Liquormart*, 517 U.S. at 507; *see also United States* v. *Playboy Entmt. Group, Inc.*, 529 U.S. 803, 817 (2000) (less restrictive but unpublicized option was not given a "fighting chance" and cannot become a meaningful alternative if not promoted). It also overlooked that other less restrictive changes to the FTC and FCC rules fully addressed any alleged shortcomings of the company-specific rules. The FTC added a rule prohibiting interference with efforts to be placed on companies' do-not-call lists, 16 C.F.R. § 310.4(b)(1)(ii), and rules governing abandoned calls and Caller ID address other problems the agencies identified in justifying the DNCR. *See e.g.*, 16 C.F.R. §§ 310.4(b)(1)(iv), 310.4(b)(4), 310.4(a)(7); 47 C.F.R. §§ 64.1200(a)(6), 64.1601(e).

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on average, just under one call to about 1.36 calls per week from all sources, including political and charitable organizations. Comments of Diana Mey, Apr. 24, 2000, in FTC File No. P994414 (cited at, *inter alia*, 68 Fed. Reg. at 4629, 4633, App. 364a-365a, 382a); Comments of Joe Shields, *Rules and Regulations Implementating the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at Encl. A (Dec. 3, 2002) (cited at 18 FCC Rcd. at 14118, 14125, App. 763a, 773a).

[16] The FTC's own staff, in fact, testified just before the rulemaking began that "nonprofits [are] the biggest problem." *Telemarketing Sales Rule "Do-Not-Call" Forum*, Matter No. P994414, at 75 (Jan. 11, 2000).

III. THIS COURT SHOULD REVIEW WHETHER THE DNCR FEES VIOLATE THE FIRST AMENDMENT

Even if the DNCR were constitutional in general, its fee regime still violates the First Amendment. While the government may condition free speech on the payment of a fee "to meet the expense incident to the administration" of a legitimate regulation, *Cox v. New Hampshire,* 312 U.S. 569, 570-71 (1941) (parade supervision), it may not tax free speech in order to raise general-purpose revenue. *Murdock v. Pennsylvania,* 319 U.S. 105, 113-14 (1943); *accord National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1106 (D.C. Cir. 1976). This is particularly so when, as here, a tax discriminates among similarly situated speakers. *See Leathers v. Medlock*, 499 U.S. 439 (1991); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583-584 & n.6 (1983).

The Tenth Circuit held "the do-not-call registry fees are to be used only to pay for expenses incident to the do-not-call registry," including "agency infrastructure and administration." 358 F.3d at 1247. App. 32a. But the "infrastructure and administration costs" paid by the fees include "the Consumer Sentinel System (the agency's repository for all consumer *fraud-related* complaints) and its attendant infrastructure." *Amended Fees Rule,* 68 Fed. Reg. at 45141 (emphasis added). App. 143a. As noted *supra*, fraud prevention has nothing to do with the DNCR's blanket bans on truthful, nonmisleading telemarketing calls. Indeed, most of the fees charged telemarketers appear to be devoted to a purpose unrelated to the "do-not-call" rules; the FTC is collecting $18.1 million at the same time it pays an outside contractor only $3.5 million to administer the DNCR. This Court should grant review to make clear that an agency may

not transform what is supposed to be "a payment for a . . . service rendered" into "a revenue measure" to garner funds the agency uses for more generalized purposes. *National Cable*, 554 F.2d at 1106.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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May 14, 2004

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Feb. 17, 2004]

Nos. 03-1429, 03-6258, 03-9571, 03-9594

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG Marketing, Inc., a Colorado corporation; American Teleservices Association,

Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

and

Timothy J. Muris, Chairman of the Federal Trade Commission; Sheila F. Anthony, Commissioner, Federal Trade Commission; Mozelle W. Thompson, Commissioner, Federal Trade Commission; Orson Swindle, Commissioner, Federal Trade Commission; Thomas B. Leary, Commissioner, Federal Trade Commission; J. Howard Beales, III, Director, Bureau of Consumer Protection, in their official capacities,

Defendants.

United States of America,

Intervenor,

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New

Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming; AARP; W.J. "Billy" Tauzin, John D. Dingell, and certain other members of the House of Representatives of the United States; ACA International; Undersigned Members of the United States Senate Committee on Commerce, Science, and Transportation; The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

U.S. Security, an Oklahoma corporation; Chartered Benefit Services, Inc., an Illinois corporation, Global Contact Services, Inc., a Delaware corporation; Infocision Management Corporation, a Delaware corporation; Direct Marketing Association, Inc., a New York non-profit association,

Plaintiffs-Appellees,

v.

Federal Trade Commission,

Defendant-Appellant.

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington,

West Virginia and Wyoming; ACA International; The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG Marketing, Inc., a Colorado corporation; American Teleservices Association,

Petitioners,

v.

Federal Communications Commission;
United States of America,

Respondents.

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District Of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming; ACA International; The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

Competitive Telecommunications Association,

Petitioner,

v.

Federal Communications Commission;
United States of America,

Respondents.

The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

Before SEYMOUR, EBEL and HENRY, *Circuit Judges*.

EBEL, *Circuit Judge*.

The four cases consolidated in this appeal involve challenges to the national do-not-call registry, which allows individuals to register their phone numbers on a national "do-not-call list" and prohibits most commercial telemarketers from calling the numbers on that list. The primary issue in this case is whether the First Amendment prevents the government from establishing an opt-in telemarketing regulation that provides a mechanism for consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls.[1] We hold that the do-not-call registry is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech. In other words, there is a reasonable fit between the do-not-call regulations and the government's reasons for enacting them.

As we discuss below in greater detail, four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements. First, the list restricts only

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[1] The telemarketers also marshal attacks on the fees they must pay to access the national do-not-call registry and to the regulations' exception for commercial callers who have an established business relationship with the consumer. We address those alternative arguments in parts IV(A) and IV(B) below. Finally, in part IV(C), we discuss the FTC's statutory authority to enact its national do-not-call regulations.

core commercial speech--i.e., commercial sales calls.[2] Second, the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence. *See Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Third, the do-not-call registry is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers. Fourth, the do-not-call registry materially furthers the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of the calls that cause these problems. Under these circumstances, we conclude that the requirements of the First Amendment are satisfied.

A number of additional features of the national do-not-call registry, although not dispositive, further demonstrate that the list is consistent with the First Amendment rights of commercial speakers. The challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising. Moreover, they give consumers a number of different options to avoid calls they do not want to receive. Namely, consumers who wish to restrict some but not all commercial sales calls can do so by using company-specific do-not-call lists or by granting some businesses express permission to call.[3] In addition, the government chose to offer consumers broader options to restrict commercial sales calls than charitable and political calls after finding that commercial calls were more intrusive and posed a greater

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[2] We express no opinion as to whether the do-not-call registry would be constitutional if it applied to political and charitable callers.

[3] The company-specific do-not-call regulations require that a company must respect a consumer's request not to receive calls from or on behalf of that particular business. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A); 47 C.F.R. § 64.1200(d)(3).

danger of consumer abuse. The government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but it had no comparable evidence with respect to charitable and political fundraising.

The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive. Just as a consumer can avoid door-to-door peddlers by placing a "No Solicitation" sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so. We are convinced that the First Amendment does not prevent the government from giving consumers this option.

I. BACKGROUND

In 2003, two federal agencies--the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)--promulgated rules that together created the national do-not-call registry. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (FTC rule); 47 C.F.R. § 64.1200(c)(2) (FCC rule).[4] The national do-not-call registry is a list containing the personal telephone

[4] Congress has directed the FCC to coordinate its efforts with the FTC in order to maximize consistency between the agencies' do-not-call regulations. Do-Not-Call Implementation Act, Pub.L. No. 108-10, 117 Stat. 557 (2003). Although the FTC and FCC rules are consistent in most respects, there are some situations in which a telemarketer could be subject to do-not-call restrictions under one agency's rule but exempt under the other's. *See* Federal Trade Commission, Report to Congress Pursuant to the Do-Not-Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws (2003); Federal Communications Commission, Report on Regulatory Coordination (2003). In the interest of simplicity, and because any inconsistencies between the two rules do not affect our constitutional analysis, we generally refer to both agencies' do-not-call provisions as a single regulatory measure (the do-not-call registry). When we mean to discuss the FTC rule or the FCC rule in particular, we do so explicitly.

numbers of telephone subscribers who have voluntarily indicated that they do not wish to receive unsolicited calls from commercial telemarketers.[5] Commercial telemarketers are generally prohibited from calling phone numbers that have been placed on the do-not-call registry, and they must pay an annual fee to access the numbers on the registry so that they can delete those numbers from their telephone solicitation lists. So far, consumers have registered more than 50 million phone numbers on the national do-not-call registry.

The national do-not-call registry's restrictions apply only to telemarketing calls made by or on behalf of sellers of goods or services, and not to charitable or political fundraising calls. 16 C.F.R. §§ 310.4(b)(1)(iii)(B), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), 64.1200(f)(9).[6] Additionally, a seller may call consumers who have signed up for the national registry if it has an established business relationship with the consumer or if the consumer has given that seller express written permission to call. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i-ii); 47 C.F.R. § 64.1200(f)(9)(i-ii).[7] Telemarketers

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[5] Consumers can register their personal phone numbers for the do-not-call list either by phone or online.

[6] There has been some confusion throughout this litigation with respect to how to define the term "telemarketing." *Compare* Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, Pub.L. No. 103-297, 108 Stat. 1545 at §§ 7 (1994) ("Telemarketing Act") (defining "telemarketing" as calls "conducted to induce purchases of goods or services") *with Mainstream Mktg. Servs., Inc. v. FTC*, 283 F.Supp.2d 1151, 1154 (D.Colo.2003) (describing "telemarketing" as the practice of "soliciting sales and donations" conducted by businesses, charities, political organizations, and others). Unless otherwise indicated, we use the term "telemarketing" to refer to commercial sales calls made to induce purchases of goods or services (not charitable or political fundraising) consistent with Congress' definition in the Telemarketing Act.

[7] The "established business relationship" exception allows businesses to call customers with whom they have conducted a financial transaction or to whom they have sold, rented, or leased goods or services within 18 months of the telephone call. 47 C.F.R. § 64.1200(f)(3); Telemarketing

generally have three months from the date on which a consumer signs up for the registry to remove the consumer's phone number from their call lists. 16 C.F.R. § 310.4(b)(3)(iv); 47 C.F.R. § 64.1200(c)(2)(i)(D). Consumer registrations remain valid for five years, and phone numbers that are disconnected or reassigned will be periodically removed from the registry. 47 C.F.R § 64.1200(c)(2); Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed.Reg. 4580, 4640 (Jan. 29, 2003).

The national do-not-call registry is the product of a regulatory effort dating back to 1991 aimed at protecting the privacy rights of consumers and curbing the risk of telemarketing abuse. *See generally FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 857-58 (10th Cir.2003). In the Telephone Consumer Protection Act of 1991 ("TCPA")--under which the FCC enacted its do-not-call rules--Congress found that for many consumers telemarketing sales calls constitute an intrusive invasion of privacy. *See* Pub.L. No. 102-243, 105 Stat. 2394 at § 2 (1991). Moreover, the TCPA's legislative history cited statistical data indicating that "most unwanted telephone solicitations are commercial in nature" and that "unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R.Rep. No. 102-317 at 16 (1991). The TCPA therefore authorized the FCC to establish a national database of consumers who object to receiving "telephone

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Sales Rule, Statement of Basis and Purpose, 68 Fed.Reg. 4580, 4591 (Jan. 29, 2003). Additionally, sellers can call consumers on the national do-not-call registry within three months after the consumer makes an inquiry or application. 47 C.F.R § 64.1200(f)(3). A seller who has an established business relationship with a consumer is still bound to comply with the company-specific rules if the consumer requests not to be called. *Id.* at § 64.1200(f)(3)(i).

solicitations," which the act defined as commercial sales calls. Pub.L. No. 102-243, 105 Stat. 2394 at § 3.[8]

Furthermore, in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 ("Telemarketing Act")--under which the FTC enacted its do-not-call rules--Congress found that consumers lose an estimated $40 billion each year due to telemarketing fraud. *See* Pub.L. No. 103-297, 108 Stat. 1545 at § 2 (1994). Therefore, Congress authorized the FTC to prohibit sales calls that a reasonable consumer would consider coercive or abusive of his or her right to privacy. *Id.* at § 3.

The FCC and FTC initially sought to accomplish the goals of the TCPA and the Telemarketing Act by adopting company-specific do-not-call lists, requiring sellers to maintain lists of consumers who have requested not to be called by that particular solicitor, and requiring telemarketers to honor those requests. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752 at ¶ 23-24 (Sept. 17, 1992); Telemarketing Sales Rule, Statement of Basis and Purpose, 60 Fed.Reg. 43842, 43854-55 (Aug. 23, 1995). Yet in enacting the national do-not-call registry, the agencies concluded that the company-specific lists had failed to achieve Congress' objectives. *See* Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed Reg. 4580, 4629, 4631 (Jan. 29, 2003); Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed.Reg. 44144, 44144-45 (July 25, 2003). Among other shortfalls, the agencies explained that the large number of possible telephone solicitors made it burdensome for consumers to assert

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[8] The TCPA defines a "telephone solicitation" as a "telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services," excluding, inter alia, calls from tax exempt nonprofit organizations. Pub.L. No. 103-297, 108 Stat. 1545 at § 3.

their rights under the company-specific rules, and that commercial telemarketers often ignored consumers' requests not to be called. 68 Fed.Reg. at 4629. Accordingly, the agencies decided to keep the company-specific rules as an option available to consumers, but to supplement them with the national do-not-call registry. *Id.*; 68 Fed.Reg. at 44144.

In this appeal we have consolidated four cases challenging various aspects of the national do-not-call registry.[9] Cases Nos. 03-1429, 03-6258 and 03-9571 involve First Amendment attacks on the do-not-call list and its registry fees. We address these issues in parts III and IV(A) respectively. Case No. 03-9594 involves a challenge to the FCC rule's established business relationship exception on administrative law grounds. We address this issue in part IV(B). Finally, in part IV(C), we address the alternative argument that the FTC lacked statutory authority to enact its do-not-call regulations, an argument that the district court relied upon in case No. 03-6258. We conclude that all of the telemarketers' challenges lack merit and we uphold the do-not-call list in its entirety.

II. STANDARD OF REVIEW

The constitutionality of the national do-not-call registry and its fees under the First Amendment are questions of law

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[9] Case No. 03-1429 reaches us on appeal from the District of Colorado, which held that the FTC's do-not-call rules were unconstitutional on First Amendment grounds. In that case, the district court enjoined the FTC from implementing the do-not-call registry. We stayed that injunction, pending our review on the merits, in *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir.2003). Case No. 03-6258 reaches us on appeal from the Western District of Oklahoma, which held that the FTC lacked the statutory authority to enact its do-not-call rules. In that case, the court also approved certain unrelated aspects of the Telemarketing Sales Rule, and the portions of its decision addressing those issues are not before us on appeal. In cases No. 03-9571 and No. 03-9594, we review the FCC order directly pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

we review de novo. *See Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246 (10th Cir.2000). We review whether the FCC's decision to include an established business relationship exception violated the Administrative Procedure Act under the arbitrary and capricious standard. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir.1997). Finally, we review de novo a district court's decision that an agency lacked authority under the controlling statute to act, keeping in mind that the courts owe deference to a federal agency's interpretation of a statute it administers. *See Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 824 (10th Cir.2000) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842- 43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

III. FIRST AMENDMENT ANALYSIS

The national do-not-call registry's telemarketing restrictions apply only to commercial speech. Like most commercial speech regulations, the do-not-call rules draw a line between commercial and non-commercial speech on the basis of content. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n. 11, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("If commercial speech is to be distinguished, it must be distinguished by its content."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (same). In reviewing commercial speech regulations, we apply the *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416, 429-30, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (noting that the challenged law drew content-based distinctions between commercial and non-commercial speech and applying more lenient scrutiny under *Central Hudson*); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) ("This case . . . concerns pure commer-

cial advertising, for which we have always reserved a lesser degree of protection under the First Amendment."); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir.1994) (content-based regulations disadvantaging commercial speech are reviewed pursuant to the lesser degree of First Amendment protection provided in *Central Hudson*).

Central Hudson established a three-part test governing First Amendment challenges to regulations restricting non-misleading commercial speech that relates to lawful activity. First, the government must assert a substantial interest to be achieved by the regulation. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343. Second, the regulation must directly advance that governmental interest, meaning that it must do more than provide "only ineffective or remote support for the government's purpose." *Id.* Third, although the regulation need not be the least restrictive measure available, it must be narrowly tailored not to restrict more speech than necessary. *See id.; Board of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Together, these final two factors require that there be a reasonable fit between the government's objectives and the means it chooses to accomplish those ends. *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

The government bears the burden of asserting one or more substantial governmental interests and demonstrating a reasonable fit between those interests and the challenged regulation. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir.2001). The government is not limited in the evidence it may use to meet its burden. For example, a commercial speech regulation may be justified by anecdotes, history, consensus, or simple common sense. *Went For It*, 515 U.S. at 628, 115 S.Ct. 2371. Yet we may not take it upon ourselves to supplant the interests put forward by the state with our own ideas of what goals the

challenged laws might serve. *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

A. Governmental Interests

The government asserts that the do-not-call regulations are justified by its interests in 1) protecting the privacy of individuals in their homes, and 2) protecting consumers against the risk of fraudulent and abusive solicitation. *See* 68 Fed.Reg. 44144; 68 Fed.Reg. at 4635. Both of these justifications are undisputedly substantial governmental interests.

In *Rowan v. United States Post Office Dep't*, the Supreme Court upheld the right of a homeowner to restrict material that could be mailed to his or her house. 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). The Court emphasized the importance of individual privacy, particularly in the context of the home, stating that "the ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Id.* at 737, 90 S.Ct. 1484. In *Frisby v. Schultz*, the Court again stressed the unique nature of the home and recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980)). As the Court held in *Frisby:*

> One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85, 108 S.Ct. 2495 (citations omitted). Likewise, in *Hill v. Colorado*, the Court called the unwilling listener's

interest in avoiding unwanted communication part of the broader right to be let alone that Justice Brandeis described as "the right most valued by civilized men." 530 U.S. 703, 716-17, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)). The Court added that the right to avoid unwanted speech has special force in the context of the home. *Id.; see also FCC v. Pacifica Found.*, 438 U.S. 726, 748, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

Additionally, the Supreme Court has recognized that the government has a substantial interest in preventing abusive and coercive sales practices. *Edenfield v. Fane*, 507 U.S. 761, 768-69, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("[T]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)).

B. Reasonable Fit

A reasonable fit exists between the do-not-call rules and the government's privacy and consumer protection interests if the regulation directly advances those interests and is narrowly tailored. *See Central Hudson*, 447 U.S. at 564-65, 100 S.Ct. 2343. In this context, the "narrowly tailored" standard does not require that the government's response to protect substantial interests be the least restrictive measure available. All that is required is a proportional response. *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

In other words, the national do-not-call registry is valid if it is designed to provide effective support for the government's

purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked just as well. *See Central Hudson*, 447 U.S. at 564-65, 100 S.Ct. 2343. These criteria are plainly established in this case. The do-not-call registry directly advances the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.

1. Effectiveness

The telemarketers assert that the do-not-call registry is unconstitutionally underinclusive because it does not apply to charitable and political callers. First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context. As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Id.* The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *see also Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343 ("If a regulation "provides only ineffective or remote support for the government's purpose" it cannot be said to bear a reasonable fit with that purported objective"). *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (underinclusiveness provides a basis for a First Amendment claim when it constitutes an "attempt

to give one side of a debatable public question an advantage in expressing its views to the people").

In *Rubin*, for example, the Supreme Court struck down a law prohibiting brewers from putting the alcohol content of their product on beer labels, purportedly in an effort to discourage "strength wars." 514 U.S. at 478, 115 S.Ct. 1585. However, the law allowed advertisements disclosing the alcohol content of beers, allowed sellers of wines and spirits to disclose alcohol content on labels (and even required such disclosure for certain wines), and allowed brewers to signal high alcohol content by using the term "malt liquor." *Id.* at 488-89, 115 S.Ct. 1585. Under these circumstances, the Court concluded that there was little chance that the beer label rule would materially deter strength wars in light of the "irrationality of this unique and puzzling regulatory framework." *Id.* at 489, 115 S.Ct. 1585.

Likewise, in *City of Cincinnati v. Discovery Network*, the Court struck down a law prohibiting commercial newsracks on public property, purportedly in order to promote the safety and attractive appearance of its streets and sidewalks. 507 U.S. 410, 412, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). However, the ban applied to only 62 of the 1,500 to 2,000 newsracks in the city, thus addressing only a "minute" and "paltry" share of the problem. *Id.* at 417-18, 113 S.Ct. 1505. Moreover, the challenged ordinance was not enacted in an effort to address problems posed by newsracks, but was actually an "outdated prohibition against the distribution of any commercial handbills on public property . . . enacted long before any concern about newsracks developed." *Id.* For these reasons, the Court held in part II of that opinion that "the city did not establish the reasonable fit we require." *Id.* at 417-18, 113 S.Ct. 1505.

Yet so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal under *Central Hudson*. For example, in *Edge Broadcasting* the

Supreme Court approved a regulation that prohibited broadcasters in North Carolina (which did not permit lotteries) from broadcasting lottery advertisements on the radio, even as applied to a broadcaster located near the border of Virginia (where lotteries were legal) whose audience consisted of 92.2 percent Virginians. 509 U.S. 418, 423-24, 431-33, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). The Court found it determinative that the regulation prevented lottery ads from reaching about 127,000 North Carolina residents (7.8 percent of Edge's listeners):[10]

> It could hardly be denied . . . that these facts, standing alone, would clearly show that applying the statutory restriction to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy. . . . [T]his result could hardly be called either "ineffective," "remote," or "conditional." Nor could it be called only "limited incremental support" for the Government interest.

Id. at 432, 113 S.Ct. 2696 (citations omitted). The Court rejected Edge's argument that the regulations banning lottery advertising by in-state radio failed materially to advance the government's interests because North Carolina residents were already inundated with lottery advertising from other sources, such as Virginia radio and television programs. *Id.* at 434-35, 113 S.Ct. 2696. "[T]he Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated." *Id.* at 434, 113 S.Ct. 2696; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[P]rohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the

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[10] In the North Carolina counties Edge served, its broadcasts accounted for about 11 percent of all radio listening. *Edge Broad.*, 509 U.S. at 431-32, 113 S.Ct. 2696.

fact that the ordinance is underinclusive because it permits onsite advertising.").

As discussed above, the national do-not-call registry is designed to reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation. The registry directly advances those goals. So far, more than 50 million telephone numbers have been registered on the do-not-call list, and the do-not-call regulations protect these households from receiving most unwanted telemarketing calls. According to the telemarketers' own estimate, 2.64 telemarketing calls per week--or more than 137 calls annually--were directed at an average consumer before the do-not-call list came into effect. *Cf.* 68 Fed.Reg. at 44152 (discussing the five-fold increase in the total number of telemarketing calls between 1991 and 2003). Accordingly, absent the do-not-call registry, telemarketers would call those consumers who have already signed up for the registry an estimated total of 6.85 *billion* times each year.

To be sure, the do-not-call list will not block all of these calls. Nevertheless, it will prohibit a substantial number of them, making it difficult to fathom how the registry could be called an "ineffective" means of stopping invasive or abusive calls, or a regulation that "furnish[es] only speculative or marginal support" for the government's interests. *See also id.* (noting the effectiveness of state do-not-call lists in reducing unwanted telemarketing calls).[11]

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[11] It is unclear from the record exactly how many telemarketing calls will be blocked by the do-not-call regulations. Most significantly, we have not been provided with data as to how many of these unsolicited sales calls would be permissible under the established business relationship exception. In applying *Central Hudson,* however, we are entitled to rely on anecdotal evidence and make the common sense observation that the do-not-call list will apply to a substantial number of telemarketing calls. *See Went For It,* 515 U.S. at 628, 115 S.Ct. 2371; *cf.* 68 Fed.Reg. at 44153-54 (suggesting that the volume of calls exempted under the

Furthermore, the do-not-call list prohibits not only a significant *number* of commercial sales calls, but also a significant *percentage* of all calls causing the problems that Congress sought to address (whether commercial, charitable or political). The record demonstrates that a substantial share of all solicitation calls will be governed by the do-not-call rules. *See* H.R.Rep. No. 102-317, at 16 (1991) ("[M]ost unwanted telephone solicitations are commercial in nature."); 68 Fed.Reg. at 44153-54 (the high volume and unexpected nature of commercial calls subject to the national do-not-call registry makes those calls more problematic than nonprofit calls and solicitations based on established business relationships).

The telemarketers asserted before the FTC that they might have to lay off up to 50 percent of their employees if the national do-not-call registry came into effect. *See* 68 Fed. Reg. at 4631. It is reasonable to conclude that the telemarketers' planned reduction in force corresponds to a decrease in the amount of calls they will make. Significantly, the percentage of *unwanted* calls that will be prohibited will be even higher than the percentage of all unsolicited calls blocked by the list. The individuals on the do-not-call list have declared that they do not wish to receive unsolicited commercial telemarketing calls, whereas those who do want to continue receiving such calls will not register. *Cf.* 68 Fed.Reg. at 4632 (under the national do-not-call regulations, "telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object").

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established business relationship exception most likely will be relatively low compared to the volume of calls subject to the do-not-call restrictions); 68 Fed.Reg. at 4631 (noting that telemarketers expect to lay off up to half of their employees in response to the do-not-call regulations).

Finally, the type of unsolicited calls that the do-not-call list does prohibit--commercial sales calls--is the type that Congress, the FTC and the FCC have all determined to be most to blame for the problems the government is seeking to redress. According to the legislative history accompanying the TCPA, "[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R.Rep. No. 102-317, at 16 (1991) (noting that non-commercial calls were less intrusive to consumers' privacy because they are more expected and because there is a lower volume of such calls); *see also* 68 Fed.Reg. at 44153. Similarly, the FCC determined that calls from solicitors with an established business relationship with the recipient are less problematic than other commercial calls. 68 Fed.Reg. at 44154 ("Consumers are more likely to anticipate contacts from companies with whom they have an existing relationship and the volume of such calls will most likely be lower.").

Additionally, the FTC has found that commercial callers are more likely than non-commercial callers to engage in deceptive and abusive practices. 68 Fed.Reg. at 4637 ("When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter."). Specifically, the FTC concluded that in charitable and political calls, a significant purpose of the call is to sell a cause, not merely to receive a donation, and that non-commercial callers thus have stronger incentives not to alienate the people they call or to engage in abusive and deceptive practices. *Id.; cf. Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) ("[B]ecause charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech."). The speech

regulated by the do-not-call list is therefore the speech most likely to cause the problems the government sought to alleviate in enacting that list, further demonstrating that the regulation directly advances the government's interests.

In sum, the do-not-call list directly advances the government's interests--reducing intrusions upon consumer privacy and the risk of fraud or abuse--by restricting a substantial number (and also a substantial percentage) of the calls that cause these problems. Unlike the regulations struck down in *Rubin* and *Discovery Network*, the do-not-call list is not so underinclusive that it fails materially to advance the government's goals.

2. Narrow Tailoring

Although the least restrictive means test is not the test to be used in the commercial speech context, commercial speech regulations do at least have to be "narrowly tailored" and provide a "reasonable fit" between the problem and the solution. Whether or not there are "numerous and obvious less-burdensome alternatives" is a relevant consideration in our narrow tailoring analysis. *Went For It*, 515 U.S. at 632, 115 S.Ct. 2371. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Accordingly, we consider whether there are numerous and obvious alternatives that would restrict less speech and would serve the government's interest as effectively as the challenged law. *See Central Hudson*, 447 U.S. at 565, 100 S.Ct. 2343; *Edge Broad.*, 509 U.S. at 430, 113 S.Ct. 2696.

We hold that the national do-not-call registry is narrowly tailored because it does not over-regulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("There simply is no right to

force speech into the home of an unwilling listener."); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) ("We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another."). The do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute an invasion of privacy. *See Hill v. Colorado*, 530 U.S. 703, 716-17, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (the right of privacy includes an unwilling listener's interest in avoiding unwanted communication).

The Supreme Court has repeatedly held that speech restrictions based on private choice (i.e.--an opt-in feature) are less restrictive than laws that prohibit speech directly. In *Rowan*, for example, the Court approved a law under which an individual could require a mailer to stop all future mailings if he or she received advertisements that he or she believed to be erotically arousing or sexually provocative. 397 U.S. at 729-30, 738, 90 S.Ct. 1484. Although it was the government that empowered individuals to avoid materials they considered provocative, the Court emphasized that the mailer's right to communicate was circumscribed only by an affirmative act of a householder. *Id.* at 738, 90 S.Ct. 1484. "Congress has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Id.*

Likewise, in rejecting direct prohibitions of speech (even fully protected speech), the Supreme Court has often reasoned that an opt-in regulation would have been a less restrictive alternative. In *Martin v. City of Struthers*, the Court struck down a city ordinance prohibiting door-to- door canvassing, noting that the government's interest could have

been achieved in a less restrictive manner by giving householders the choice of whether or not to receive visitors. 319 U.S. 141, 147-49, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) ("[T]he decision as to whether distributers of literature may lawfully call at a home . . . belongs . . . with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant.").[12] More recently, in *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, the Court struck down a permit requirement for door-to-door advocacy, while noting that another section of the ordinance allowing residents to post "No Solicitation" signs provided ample protection for the unwilling listener. 536 U.S. 150, 153, 168-69, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) ("[T]he provision permitting homeowners to bar solicitors from their property by posting signs reading 'No Solicitors or Peddlers Invited' suggests the availability of less intrusive and more effective measures to protect privacy.") (citations omitted).

The idea that an opt-in regulation is less restrictive than a direct prohibition of speech applies not only to traditional door-to-door solicitation, but also to regulations seeking to protect the privacy of the home from unwanted intrusions via telephone, television, or the Internet. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (opt-in targeted blocking of offensive television programming "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners. . . .

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[12] The Court in *Martin* suggested that one kind of regulation of home solicitation that would pass constitutional muster would be a regulation "which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed." 319 U.S. at 148, 63 S.Ct. 862.

Simply put, targeted blocking is less restrictive than banning . . . . ."); *cf. Reno v. ACLU*, 521 U.S. 844, 860, 879, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (striking down an absolute prohibition against making certain sexually explicit material available to minors on the Internet on the grounds that it curtailed the speech of adults, contrasting that regulation with the alternative of facilitating parental control of such material).

Like the do-not-mail regulation approved in *Rowan*, the national do-not-call registry does not itself prohibit any speech. Instead, it merely "permits a citizen to erect a wall . . . that no advertiser may penetrate without his acquiescence." *See Rowan*, 397 U.S. at 738, 90 S.Ct. 1484. Almost by definition, the do-not-call regulations only block calls that would constitute unwanted intrusions into the privacy of consumers who have signed up for the list. Moreover, it allows consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them. Under the circumstances we address in this case, we conclude that the do-not-call registry's opt-in feature renders it a narrowly tailored commercial speech regulation.

The do-not-call registry's narrow tailoring is further demonstrated by the fact that it presents both sellers and consumers with a number of options to make and receive sales offers. From the seller's perspective, the do-not-call registry restricts only one avenue by which solicitors can communicate with consumers who have registered for the list. In particular, the do-not-call regulations do not prevent businesses from corresponding with potential customers by mail or by means of advertising through other media. *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633-34, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (holding a 30-day post-accident ban on attorney solicitations narrowly tailored, finding it relevant that ample alternative channels for advertising legal services were available).

From the consumer's perspective, the do-not-call rules provide a number of different options allowing consumers to dictate what telemarketing calls they wish to receive and what calls they wish to avoid. Consumers who would like to receive some commercial sales calls but not others can sign up for the national do-not-call registry but give written permission to call to those businesses from whom they wish to receive offers. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(*i*); 47 C.F.R. § 64.1200(f)(9)(i). Alternatively, they may decline to sign up on the national registry but make company-specific do-not-call requests with those particular businesses from whom they do not wish to receive calls. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A); 47 C.F.R. § 64.1200(d)(3). Therefore, under the current regulations, consumers choose between two default rules--either that telemarketers may call or that they may not. Then, consumers may make company-specific modifications to either of these default rules as they see fit, either granting particular sellers permission to call or blocking calls from certain sellers.

Finally, none of the telemarketers' proposed alternatives would serve the government's interests as effectively as the national do-not-call list. Primarily, the telemarketers suggest that company-specific rules effectively protected consumers. Yet as the FTC found, "[t]he record in this matter overwhelmingly shows the contrary . . . it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer." 68 Fed.Reg. at 4631.

First, the company-specific approach proved to be extremely burdensome to consumers, who had to repeat their do-not-call requests to every solicitor who called. *Id.* at 4629. In effect, this system gave solicitors one free chance to call each consumer, although many consumers find even an initial unsolicited sales call abusive and invasive of privacy. *Id.* at 4629-30; *cf. FCC v. Pacifica Found.*, 438 U.S. 726, 748-49,

98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not . . . avoid a harm that has already taken place."). Second, the government's experience under the company-specific rules demonstrated that commercial solicitors often ignored consumers' requests to be placed on their company-specific lists. 68 Fed.Reg. at 4629. Third, consumers have no way to verify whether their numbers have been removed from a solicitor's calling list in response to a company-specific do-not-call request. *Id.* Finally, company-specific rules are difficult to enforce because they require consumers to bear the evidentiary burden of keeping lists detailing which telemarketers have called them and what do-not-call requests they have made. *Id.*

The telemarketers' objection that the company-specific approach should have been more vigorously marketed to consumers is unavailing because the flaws the FTC identified are inherent in the company-specific rule. More consumer education simply could not have cured the ineffectiveness of the former system. Similarly, even if we were to agree with the telemarketers' argument that violations of the company-specific list were not adequately enforced, the national do-not-call program improves upon failures of the company-specific approach that were not caused by any lack of enforcement. Unlike the national registry, the company-specific approach gave a vast number of potential solicitors one shot at each unwilling consumer and was significantly more difficult for consumers to use. Moreover, the national do-not-call registry will be easier to enforce than the company-specific rules because there will generally be no dispute as to whether a certain telemarketer is prohibited from calling a particular number.

Finally, the telemarketers argue that it would have been less restrictive to let consumers rely on technological alternatives--such as caller ID, call rejection services, and electronic devices designed to block unwanted calls. Each of these alternatives puts the cost of avoiding unwanted telemarketing calls on consumers. Furthermore, as the FCC found, "[a]lthough technology has improved to assist consumers in blocking unwanted calls, it has also evolved in such a way as to assist telemarketers in making greater numbers of calls and even circumventing such blocking technologies." 68 Fed.Reg. at 44147. Forcing consumers to compete in a technological arms race with the telemarketing industry is not an equally effective alternative to the do-not-call registry.

In sum, the do-not-call registry is narrowly tailored to restrict only speech that contributes to the problems the government seeks to redress, namely the intrusion into personal privacy and the risk of fraud and abuse caused by telephone calls that consumers do not welcome into their homes. No calls are restricted unless the recipient has affirmatively declared that he or she does not wish to receive them. Moreover, telemarketers still have the ability to contact consumers in other ways, and consumers have a number of different options in determining what telemarketing calls they will receive. Finally, there are not numerous and obvious less-burdensome alternatives that would restrict less speech while accomplishing the government's objectives equally as well.

C. Discovery Network

As should be clear from the foregoing discussion, the telemarketers' reliance on *Discovery Network* is misplaced. In *Discovery Network,* the Supreme Court applied *Central Hudson* to strike down a municipal policy directly prohibiting freestanding commercial newsracks on public property. 507 U.S. at 412, 416, 113 S.Ct. 1505. It concluded that the regulation--which did not similarly restrict non-commercial

newsracks--did not bear a reasonable fit to the city's interests in promoting safety and the attractive appearance of the city's public areas. *Id.* at 412, 417, 113 S.Ct. 1505. In particular, the Court emphasized that 1) the regulation applied to only a "minute" and "paltry" share of the total number of newsracks in the city, *id.* at 418, 113 S.Ct. 1505, and 2) the regulation's distinction between commercial and non-commercial speech bore "no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424, 113 S.Ct. 1505 (emphasis in original).

The trifling number of newsracks regulated in *Discovery Network* suggested that the policy did not materially advance the city's interests, and this aspect of the regulation was not justified by evidence demonstrating that despite their small numbers the commercial newsracks disproportionately caused the problems the city sought to remedy. The Court held, in essence, that a regulation that has only a minimal impact on the identified problem cannot be saved simply because it targets only commercial speech, which occupies a lower place in our First Amendment jurisprudence. The Court concluded that the "low value" of commercial speech was "an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, *and* have only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418, 113 S.Ct. 1505 (emphasis added). Under a straightforward application of *Central Hudson*, the Court struck down the city's newsrack ordinance because it failed directly to advance the city's interests.

Both of the factors the Court emphasized in *Discovery Network* are absent in our case. First, while the regulation in *Discovery Network* applied only to a minute and paltry number of newsracks, the do-not-call registry blocks a substantial amount of unwanted telemarketing calls. *See supra* part III(B)(1). Second, while the distinction between

commercial and non-commercial speech in *Discovery Network* bore no relationship whatsoever to the city's as serted interests, the do-not-call registry's commercial/non-commercial distinction was based on findings that commercial telephone solicitation was significantly more problematic than charitable or political fundraising calls. *Id.; see also FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 856-60 (10th Cir.2003). Additionally, the government had evidence that other alternatives (company-specific restrictions) failed in the commercial context, but had no comparable experience involving the failure of company-specific restrictions with respect to charitable or political callers. *See supra* part III(B)(2); 68 Fed.Reg. at 4637.

D. Summary

For the reasons discussed above, the government has asserted substantial interests to be served by the do-not-call registry (privacy and consumer protection), the do-not-call registry will directly advance those interests by banning a substantial amount of unwanted telemarketing calls, and the regulation is narrowly tailored because its opt-in feature ensures that it does not restrict any speech directed at a willing listener. In other words, the do-not-call registry bears a reasonable fit with the purposes the government sought to advance. Therefore, it is consistent with the limits the First Amendment imposes on laws restricting commercial speech.[13]

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[13] Our conclusion is consistent with other circuits' decisions approving similar telecommunications regulations. *See Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir.2003) (upholding TCPA regulation prohibiting unsolicited commercial fax advertising); *Destination Ventures, Ltd., v. FCC*, 46 F.3d 54 (9th Cir.1995) (same); *Moser v. FCC*, 46 F.3d 970, 972-75 (9th Cir.1995) (upholding ban on prerecorded commercial telemarketing).

IV. OTHER ISSUES

The telemarketers also challenge various other aspects of the do-not-call registry. In turn, we consider 1) whether the fees telemarketers must pay to access the registry are constitutional, 2) whether it was arbitrary and capricious for the FCC to approve the established business relationship exception, and 3) whether the FTC had statutory authority to enact its do-not- call rules.[14]

A. The Do-Not-Call Registry Fees

To obtain the phone numbers of consumers who have signed up for the national do-not-call registry, telemarketers must pay a modest annual access fee determined by the FTC. Currently, the fee is $25 per area code of data, except that the first five area codes are provided free of charge and the maximum annual fee is capped at $7,375. 16 C.F.R. § 310.8(c). The telemarketers argue that this fee unconstitutionally imposes a revenue tax on protected speech. We disagree.

It is well-established that the First Amendment protects against the imposition of charges, such as a license taxes, for the enjoyment of free speech rights. *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Nevertheless, the government is permitted to exact a fee in order to defray the cost of legitimate regulations, even though such a fee incidentally burdens speech. *See id.* at 114

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[14] The telemarketers' challenge to the do-not-call registry fees was raised below in case No. 03-1429, although the district court did not reach this issue. The challenge to the FCC's established business relationship exception has been raised only in case No. 03-9594, in which we review the FCC action directly. The telemarketers' challenge to the FTC's statutory authority to enact its do-not-call regulations was raised below in case Nos. 03-1429 and 03-6258. In case No. 03-1429, the district court declined to reach this issue; in case No. 03-6258, the district court held that the FTC lacked statutory authority.

n. 8, 63 S.Ct. 870. In *Murdock,* for example, the Court struck down an ordinance that required Jehovah's Witnesses to pay licensing fees in order to distribute religious materials door-to-door, explaining that the regulation was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 106, 113-14, 63 S.Ct. 870. The Court employed the same reasoning in *Cox v. New Hampshire*, upholding license fees of up to $300 to take part in a parade or procession because the fee was held "to be not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." 312 U.S. 569, 570-71, 576-77, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Accordingly, we recently approved the Utah Charitable Solicitations Act--which requires charitable fundraisers to register with the state and pay $250 for a permit--because that fee offsets increased regulatory costs associated with the act. *American Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1246, 1248-49 (10th Cir.2000). We held that "a regulatory fee may be constitutional only if it serves a 'legitimate state interest'" and that defraying the costs of a regulation aimed at protecting citizens from fraud is legitimate. *Id.* at 1248-49. Such fees may be imposed to defray both administrative expenses (such as processing and licensing costs) and the cost of enforcing the regulations. *National Awareness Found. v. Abrams*, 50 F.3d 1159, 1166 (2d Cir.1995) ("[E]nforcement power is necessary to ensure that the purposes of [the regulations] are served.").

The Do-Not-Call Implementation Act authorized the FTC to collect fees for fiscal years 2003 to 2007, requiring that "[s]uch amounts shall be available for expenditure only to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement." Pub. L. No. 108-10, 117 Stat. 557 at § 2

(2003). In enacting the fees regulation, the FTC stated it was authorized only "to assess fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR." Telemarketing Sales Rule Fees, 68 Fed.Reg. 45134, 45141 (July 31, 2003). The FTC estimated the costs of implementing and enforcing the national do-not-call registry at $18.1 million for fiscal year 2003. *Id.*

The record conclusively demonstrates that the do-not-call registry fees are to be used only to pay for expenses incident to the administration of the do-not-call registry, as required by *Murdock* and *Giani.* The FTC explained that the costs of the do-not-call registry fall into three major categories. First are the actual costs of developing and operating the national registry, such as the costs of handling consumer registration and complaints, transferring information from state lists to the registry, ensuring telemarketer access to the registry, and managing law enforcement access to appropriate information. *Id.* Second are the costs of enforcement efforts, such as domestic and international law enforcement initiatives to identify and challenge alleged violators, and consumer and business education efforts. *Id.* Third are the increased costs of agency infrastructure and administration, includ ing changes in information technology structural support necessary to handle anticipated increases in consumer complaints and requests from law enforcement agencies for access to such complaints. *Id.* The FTC decided upon the $25 per area code fee in order to ensure that it would collect the amount necessary to defray these costs.[15]

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[15] First, the FTC estimated that about 10,000 telemarketing firms would seek access to the list, and that the average telemarketer would pay to obtain about 73 area codes of data. 68 Fed.Reg. at 45141. Under those estimates, the expenses incident to the list would amount to about $25 per area code provided, excluding those that would be provided free of charge. Recognizing that its fee schedule is based on estimated figures, the FTC also emphasized that these fees would need to be reexamined

Therefore, we hold that the registry fees are a permissible regulatory measure designed to offset projected expenses incident to the administration and enforcement of the national do-not-call list, not an unconstitutional revenue tax.

B. The Established Business Relationship Exception

The telemarketers next argue that the FCC's established business relationship exception is arbitrary and capricious in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706. In particular, they contend that the FCC failed to give appropriate consideration to the anti-competitive effect that this exception may have on telecommunications markets. We conclude that the FCC did in fact address this concern, and that the FCC's exception for established business relationships is not arbitrary and capricious under the APA.

The arbitrary and capricious standard of review is a narrow one, and we are not empowered to substitute our own judgment for that of the administrative agency. *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir.1996). "Generally, an agency decision will be considered arbitrary and capricious if 'the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir.1997) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

The Telecommunications Act of 1996, 47 U.S.C. § 251 et seq., required local telephone monopolies to make their

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periodically and adjusted to reflect the FTC's actual experience in operating the registry. *Id.* at 45141-42.

facilities and services available to competitors for negotiated or arbitrated prices, and directed the FCC to establish regulations to advance local competition. The FCC enacted its do-not-call rules under different statutory authority, the TCPA, which specifically authorized the FCC to establish a national database of residential telephone subscribers who object to receiving telephone solicitations. *See* 47 U.S.C. § 227(c)(3).

When an agency is charged to enforce overlapping and at times inconsistent policies, it cannot act single-mindedly in furtherance of one of those policies while wholly ignoring the other. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46-47, 62 S.Ct. 886, 86 L.Ed. 1246 (1942); *McLean Trucking Co. v. United States*, 321 U.S. 67, 80, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

The FCC rule sufficiently addresses the telemarketers' concerns about the established business relationship exception. In its notice of rulemaking, the FCC asked for comments on the anti-competitive effect this exception might have on the telecommunications industry. *See* 68 Fed.Reg. at 44159. The FCC received responses indicating that such an exception would favor incumbent telephone service providers who would be able to market new services to their larger customer base. *Id.* at 44159-60. Also, the FCC noted some respondents' concerns that this anti-competitive effect would be particularly strong because telephone solicitations are currently the primary mechanism for selling telecommunications services. *Id.* at 44159. The FCC then considered several proposed ways in which such an anti-competitive effect could be mitigated, rejecting each of them.

First, the FCC considered a proposal to narrow the established business relationship exemption so that no telecommunications company could call its customers to advertise different services. *Id.* at 44160. However, the FCC cited comments in its administrative record emphasizing the

importance of "flexibility in communicating with . . . customers not only about their current services, but also to discuss available alternative services or products." *Id.* Accordingly, the FCC concluded that limiting telecommunications companies' ability to market new goods or services to existing customers would not be in the public interest. *Id.*

Second, the FCC considered a proposal that the Commission revise the definition of established business relationship so that all providers of telecommunications services would be deemed to have such a relationship with all consumers, even if they had not in fact had any preexisting business connections. *Id.* Third, it considered an alternative proposal that the definition of established business relationship be revised to exclude companies who have historically been dominant or monopoly service providers, at least until such time as the new entrants to the telecommunications industry sufficiently penetrated the market. *Id.* The FCC concluded that these proposals would not adequately fulfill Congress' mandate to protect residential telephone subscribers' privacy rights to avoid telemarketing calls to which they object: "To permit common carriers to call consumers with whom they have no existing relationships and who have expressed a desire not to be called by registering with the national do-not-call list, would likely confuse consumers and interfere with their ability to manage and monitor the telemarketing calls they receive." *Id.*

The FCC then explained the factors it believed would limit the established business relationship exception's anti-competitive effect. First, it noted that all providers of telecommunications services--incumbent carriers and new competitors alike--may contact competitors' customers who have not signed up for the national do-not-call registry. *Id.* Second, consumers who have signed up for the do-not-call registry still have the ability to place their carrier on a

company-specific do-not-call list, thereby overriding the established business relationship exception. *Id.* Finally, the FCC emphasized that telecommunications providers are still free to use other means of marketing their products to consumers, such as direct mailings. *Id.*

The FCC's rule demonstrates that the agency did not simply ignore the potential anti-competitive effect of the established business relationship exception or its duties under the Telecommunications Act. Rather, the FCC analyzed the possible effects that this exception may have on the telecommunications industry and explained why it believed its rule would minimize any adverse consequences. When an agency has made a reasoned policy decision, "we are not empowered to substitute our judgment for that of the [agency]" under the arbitrary and capricious standard of review. *Browner*, 97 F.3d at 424. The FCC did not act in an arbitrary and capricious manner in adopting the established business relationship exception, and we decline the telemarketers' invitation to displace the FCC's policy judgment.

C. The FTC's Statutory Authority

In case No. 03-6258, the district court held that the FTC lacked statutory authority to enact the do-not-call registry. In the Telemarketing Act, Congress authorized the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." Pub.L. 103-297, 108 Stat. 1545 at § 3. More specifically, Congress directed the FTC to include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." *Id.* The FTC's conclusion that this language authorized it to enact the national do-not-call registry is entitled to deference under the familiar test outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694

(1984).[16] In light of this deference, we conclude that the FTC did have statutory authority to promulgate its do-not-call regulations because the agency's view that the Telemarketing Act authorized it to enact those rules is at least a permissible construction of that statute.

Moreover, even if some doubt once existed, Congress erased it through subsequent legislation. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."); *Schism v. United States*, 316 F.3d 1259, 1289 (Fed.Cir.2002) ("Congress may ratify agency conduct 'giving the force of law to official action unauthorized when taken.'") (citing *Swayne & Hoyt v. United States*, 300 U.S. 297, 302, 57 S.Ct. 478, 81 L.Ed. 659 (1937)). In the Do-Not-Call Implementation Act, Congress directed the FCC and FTC to maximize consistency between their respective do-not-call rules and authorized the FTC to collect do-not-call registry fees to offset the administrative costs of the regulations. Pub.L. 108-10, 117 Stat. 557 at §§ 2-3. Furthermore, in response to the district court's decision in case No. 03-6258, Congress expressly ratified the FTC's do-not-call regulations. An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub.L. 108-82, 117 Stat 1006 (2003). The FTC's statutory authority is now unmistakably clear.

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[16] In reviewing an agency's construction of a statute it administers, we first ask whether Congress has directly spoken to the precise question at issue. If so, that is the end of the matter and Congress' intent controls. If the statute is silent or ambiguous with respect to this issue, our inquiry is limited to whether the agency's interpretation is a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

V. CONCLUSION

We hold that 1) the do-not-call list is a valid commercial speech regulation under *Central Hudson* because it directly advances substantial governmental interests and is narrowly tailored; 2) the registry fees telemarketers must pay to access the list are a permissible measure designed to defray the cost of legitimate government regulation; 3) it was not arbitrary and capricious for the FCC to adopt the established business relationship exception; and 4) the FTC has statutory authority to establish and implement the national do-not-call registry.

The judgments below in cases 03-1429 and 03-6258 are REVERSED with respect to the questions presented in this appeal, and the petitions for review in cases 03-9571 and 03-9594 are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

[Filed Oct. 7, 2003]

No. 03-1429

FEDERAL TRADE COMMISSION; TIMOTHY J. MURIS, Chairman of the FEDERAL TRADE COMMISSION, in his official capacity; SHEILA F. ANTHONY, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; MOZELLE W. THOMPSON, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; ORSON SWINDLE, Commissioner, Federal Trade Commission, in his official capacity; THOMAS B. LEARY, Commissioner, Federal Trade Commission, in his official capacity; and J. HOWARD BEALES III, Director, Bureau of Consumer Protection, in his official capacity,

Petitioners,

v.

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; AMERICAN TELESERVICES ASSOCIATION,

Respondents.

ORDER

Before SEYMOUR, EBEL, and HENRY, *Circuit Judges*.

PER CURIAM.

The Federal Trade Commission (Petitioner) ("FTC") challenges an order of the United States District Court for the

District of Colorado permanently enjoining the FTC from implementing provisions in its amended Telemarketing Sales Rule creating a national do–not–call list. The Rule created a federal registry of telephone numbers of consumers who have indicated that they do not wish to receive unsolicited telephone calls from commercial telemarketers, and it prohibits those telemarketers from making sales calls to consumers on the list.[1] The Federal Communications Commission (FCC), in coordination with the FTC, has also ordered the establishment of a national do–not–call list. The only issue to be decided at this time is the FTC's request for a stay of the district court's order pending this Court's decision on the merits.

I. Standard for Granting Stay

The FTC's request for a stay is governed by Federal Rules of Appellate Procedure 8 and 18. To obtain a stay under these rules, the FTC must address the following factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir.2001); 10th Cir. R. 8.1.

As an initial matter, the district court suggested that an additional inquiry overlays this Court's analysis of whether to grant a stay of the district court's order pending appeal. Specifically, it cited decisions from this Court setting out the following types of preliminary injunctions as "disfavored": (1) one that disturbs the status quo; (2) one that affords the

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[1] Commercial telemarketers are exempt from the FTC's do–not–call prohibitions if they have received express written consent from the consumers they call, or if they call consumers with whom they have an established business relationship. Telemarketing Sales Rule, 68 Fed.Reg. 4580, 4629 (Jan. 29, 2003).

movant substantially all the relief the movant may recover at the conclusion of a full trial on the merits; and (3) one that is mandatory as opposed to prohibitory. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 n. 4 (10th Cir.2001); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir.1991). The concerns arising from the first two types of "disfavored" injunctions are relevant only in a merits review of a preliminary injunction issued by a district court, typically on an incomplete record. Those concerns do not, however, constrain our decision whether to stay a lower court's permanent injunction issued after consideration of a complete record.[2] The concern about mandatory injunctions is not a factor in this case because a decision to stay the district court's permanent injunction does not constitute a judicial mandate requiring any of the litigants to take any action. Such a stay order would suspend an injunction, not impose one. Therefore, we do not apply the heightened scrutiny required for "disfavored" preliminary injunctions.

With respect to the four stay factors,[3] where the moving party has established that the three "harm" factors tip decid-

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[2] When issuing a preliminary injunction, a district court typically bases its decision on an incomplete record. *See, e.g., N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 753 (10th Cir.1987). As such, there is a heightened risk of issuing a preliminary injunction that will ultimately prove to be inconsistent with the court's final adjudication on the merits, resulting in irreparable injury to a party. Where, as here, there has been a full adjudication on the merits by the district court and we are considering whether to stay the district court's *permanent* injunction pending appeal, we have the benefit of a full, developed record on which to base our decision. Thus, the concerns that would trigger heightened review in the context of a preliminary injunction proceeding do not arise in the context of an appeal of a permanent injunction taken after a final judgment on the merits.

[3] In our evaluation of these four stay factors, we have considered, inter alia, the enabling statutes, legislative history, FTC and FCC regulations and agency records, the district court's decision on the merits and its order denying a stay pending appeal, the parties' motions and responses filed in this Court, and various amicus submissions.

edly in its favor, the "probability of success" requirement is somewhat relaxed. *Prairie Band*, 253 F.3d at 1246; *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781–82 (10th Cir.1964). Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised "questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Prairie Band*, 253 F.3d at 1246–47 (internal quotations omitted).

We conclude that, on balance, the three "harm" factors alone do not support a relaxed review of the probability of success factor. With respect to the second and fourth factors–which are necessarily conflated because the FTC's asserted injury is exclusively one involving the public interest–we conclude that the public does have strong privacy and expectation interests that weigh in favor of granting this stay pending review of the merits. Yet the third factor–injury to opposing parties if the stay is granted–weighs against granting the stay because Respondents will likely suffer harm if the FTC's do–not–call regulation comes into effect and is later determined to be unconstitutional, even though their injury would be tempered by our granting expedited review of this case on the merits.[4] Although we conclude that on balance the harm factors tip in the FTC's favor, those factors do not weigh so heavily towards the FTC as to justify a relaxed review of the final factor, likelihood of success on the merits. Therefore, we will grant a stay only if the FTC shows a substantial likelihood of success on the merits of its appeal. We turn then to that analysis.

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[4] Although the amended Telemarketing Sales Rule apparently would place perhaps fifty million phones off limits, that still leaves a very large population of phones that would be called during the time that this Court considers the appeal on its merits, and such phones are likely to represent more responsive potential buyers of goods and services that are marketed by telemarketing calls.

II. Likelihood of Success on the Merits

The Supreme Court has identified a 3–step test to analyze First Amendment challenges to restrictions applied to lawful and non–misleading commercial speech. Regulation of such commercial speech passes constitutional muster if (1) the government asserts a substantial interest to be achieved by the restrictions; (2) the restriction directly advances that governmental interest; and (3) the restriction is narrowly tailored to meet that interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Together, the final two factors in the *Central Hudson* analysis require that there be a "fit between the legislature's ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). The government bears the burden of demonstrating both a substantial interest and the fit between that interest and the challenged restriction. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir.2001). The *Central Hudson* test does not require that the regulation be the least restrictive means of achieving the interest asserted, but only that it be narrowly tailored to meet the desired objective. *Board of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

For purposes of First Amendment analysis, to show a reasonable fit the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486–87, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). However, in response to a First Amendment challenge to a regulation, the government is not limited in the evidence it may use to support the asserted harms; it may demonstrate its justification with anecdotes, history, consensus, and simple common sense. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 115 S.Ct. 2371, 132 L.Ed.2d 541

(1995). Moreover, while the fit must be reasonable and in proportion to the interest served, it need not be a perfect fit or the be[illegible]nt. *Fox*, 492 U.S. at 480, 109 S.Ct. 3028. "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696. We do not require "that the Government make progress on every front before it can make progress on any front." *Id.*

A. *Substantial Governmental Interest*

The FTC's do–not–call list includes commercial telemarketers but specifically excludes calls from charitable organizations. The FTC has asserted that this distinction between commercial and non–commercial speech is justified by (1) a greater risk of abusive practices associated with commercial calls, and (2) commercial solicitation's greater impact on consumer privacy, based both on the greater number of commercial calls and upon the less welcome nature of commercial calls.[5] The district court found, and

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[5] The district court believed that the FTC admitted in its regulation that privacy interests cannot justify a distinction between commercial and charitable telemarketing calls. (Mem. Opinion & Order at 7.) We disagree.

Before the FTC amended its Telemarketing Sales Rule, certain charitable organizations asked the agency not to include non–commercial callers in any do–not–call list (neither a national do–not–call list nor a company–specific do-not-call list). Although the FTC decided not to include charitable callers in a national do–not–call list, it was unwilling to exclude them from its company–specific do-not-call list if particular homeowners wanted to designate them specifically. In this context, the FTC stated that charitable callers, in addition to commercial callers, had an effect on homeowners' privacy, and thus should not be completely immune from a consumer–initiated restriction. The FTC stated that "the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers" and it therefore concluded that some regulation was appropriate even in the non–commercial context. 68 Fed. Reg. 4637. However, the FTC never found that commercial and non–commercial callers affected homeowners' privacy interests to the *same* degree. Rather, it emphasized "fundamental

Mainstream Marketing Services does not dispute, that these asserted interests in preventing abusive practices and protecting residential privacy are substantial under the first prong of *Central Hudson*.

The Supreme Court has held that there is undoubtedly a substantial governmental interest in the prevention of abusive and coercive sales practices. *See Edenfield v. Fane*, 507 U.S. 761, 768-69, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The prevention of intrusions upon privacy in the home is another paradigmatic substantial governmental interest. In *Rowan v. United States Post Office Department*, the Supreme Court held that protecting individual privacy is an important governmental interest, especially in the context of the home. 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). The Court recognized "the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." *Id.* at 737, 90 S.Ct. 1484. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Id. See also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 164–65, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (noting that "residents' privacy" is among "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity"); *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("The State's interest in protecting the well–being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.") (quotation omitted). In the context of telephone solicitations,

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differences" between commercial and charitable solicitation that make commercial callers more likely to "engage in all the things that telemarketers are hated for." *Id.* Because of this distinction, the FTC found it appropriate to subject commercial telemarketers to the national do–not–call registry, but to regulate charitable callers only under the less burdensome company–specific do–not–call rules. *Id.*

this privacy interest is not limited to the ringing of the phone; rather, how invasive a phone call may be is also influenced by the manner and substance of the call.

Therefore, the FTC's justifications of preventing abusive and coercive sales practices and protecting privacy are substantial governmental interests. We turn now to analyzing whether the FTC has established a likelihood of success on its contention that the do–not–call list bears a reasonable fit with these interests.

B. *Reasonable Fit*

1. *Relevant Factors in Analyzing Reasonable Fit*

Although a regulation may draw a line between commercial and non-commercial speech, that distinction must bear a relationship to the legitimate interests the government seeks to achieve. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424, 428, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). For example, a distinction between commercial and non–commercial speech could be justified by reference to the differing impact those categories of speech have on esthetics, safety, privacy, or the like. In contrast, the distinction may not be justified on a perceived "low value" of commercial speech. *Id.* at 428, 113 S.Ct. 1505.

In *Discovery Network*, the Supreme Court struck down a city ordinance banning freestanding commercial newsracks on grounds that the restriction was not narrowly tailored. 507 U.S. at 412, 430, 113 S.Ct. 1505. The Court recognized that the city had substantial interests in esthetics and safety that were impaired by freestanding newsracks, but concluded that there was no reasonable fit between those goals and the city's policy of banning only commercial newsracks while leaving similar non–commercial newsracks undisturbed. *Id.* at 418, 113 S.Ct. 1505. Although the Court recognized that there may be situations where "differential treatment of commercial and noncommercial newsracks" could be justified by a reasonable

fit with the government's interest in esthetics and safety, it held that the government had failed to make any such showing in that case. *Id. See also Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655–56 (8th Cir.2003) (holding that unsolicited commercial fax prohibition in Telephone Consumer Protection Act was a reasonable fit with substantial governmental interest of reducing costs and intrusion, because commercial faxes are more intrusive than non–commercial faxes).

Whether a commercial solicitation restriction meets the "reasonable fit" test depends in part on the existence of private choice on the part of homeowners. In *Martin v. City of Struthers*, the Supreme Court struck down a city ordinance banning door–to–door canvassing because it took the right to decide whether to receive visitors away from the individual's own private choice. 319 U.S. 141, 148–49, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). While recognizing the government's interest in protecting privacy, the Court held that the ordinance swept too broadly because the dangers of door–to–door canvassing easily could have been controlled by giving the householder the right to decide whether to receive visitors. *Id.* at 144, 147–48, 63 S.Ct. 862. *See also Watchtower Bible*, 536 U.S. at 168–69, 122 S.Ct. 2080 (stating that provision facilitating residents' own utilization of "no solicitation" signs was less restrictive than permit requirement and sufficient to further state's privacy interest); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (stating that targeted consumer–initiated blocking is "less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compel ling interests").

Rowan demonstrates that the element of private choice in an opt–in feature is relevant for purposes of analyzing "reasonable fit." In *Rowan*, the Court upheld an opt–in do–

not–mail list system in which a homeowner could require that a commercial advertiser remove his or her name from its mailing list if the homeowner determined in his or her "sole discretion" that the material received was erotically arousing or provocative. *Rowan*, 397 U.S. at 730, 90 S.Ct. 1484. In finding the privacy regulation reasonable, the Court emphasized the element of private choice, stating that the homeowner was the "exclusive and final judge of what will cross his threshold." *Id.* at 736, 90 S.Ct. 1484.

Other courts have relied on *Rowan*'s analysis in finding that similar mechanisms of private choice in solicitation restrictions weigh in favor of finding a "reasonable fit." *See, e.g., Anderson v. Treadwell*, 294 F.3d 453, 462–63 (2d Cir.2002) (noting, in its "reasonable fit" analysis, that resident–activated solicitation restriction was narrowly tailored and of the kind "endorsed by the Supreme Court in *Rowan*"); *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir.1998) (invalidating solicitation restriction as lacking "reasonable fit" because, unlike *Rowan*, "[h]ere, the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy–based reason").

In sum, a regulation drawing a line between commercial and non–commercial speech must have a reasonable fit with substantial governmental interests. The "reasonable fit" analysis will at least partially depend upon whether the initiation of the solicitation restriction is at the hands of private citizens or the government. Additionally, we will consider the extent to which the regulatory scheme will materially advance the governmental interest, *see Discovery Network*, 507 U.S. at 418, 113 S.Ct. 1505, and the disparity in treatment between commercial and non–commercial speech.

2. *The FTC's Record Evidence Supporting a Reasonable Fit Between the National Do–Not–Call List and its Asserted Justifications*

In light of the above legal standards, we must review the record to determine the FTC's asserted rationales for applying its national do–not–call restrictions only to commercial sales calls, and the evidence to support those rationales. Here, the FTC attempts to justify this distinction by showing that commercial telemarketing is more abusive and coercive than charitable telemarketing and constitutes a greater intrusion upon consumer privacy. We are mindful that these rationales overlap to some extent.

In reviewing the FTC's rationales for its amended rules and the evidence in support of those rationales, it is important to keep in mind that the myriad of statutes, legislative history, and administrative rules addressing federal telemarketing regulation are largely interconnected and involve both the FCC and the FTC. Instead of repeating factual findings and policy rationales in each separate enactment, the FTC and FCC have often incorporated those findings by cross–reference. For instance, in creating a company–specific do–not–call list applicable only to commercial telemarketers in the original Telemarketing Sales Rule (which the FTC enacted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, or "TCFPA"), the FTC "considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations."[6] Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4591 (Jan. 29, 2003). *See also* FCC Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44144, 44145 (July 25, 2003) ("[W]e agree with the vast majority of consumers in this proceeding and the FTC that a national do–not–call registry is necessary to

[6] The TCPA is the Telephone Consumer Protection Act of 1991.

enhance the privacy interests of those consumers that do not wish to receive telephone solicitations."); Do–Not–Call Implementation Act, Pub. L. 108–10 at § 3 (Mar. 11, 2003) ("In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission."). Therefore, we must examine each of these interrelated telemarketing enactments in evaluating the asserted justifications for the FTC's distinction between commercial speech and non–commercial speech. We briefly discuss here the most relevant of these acts and regulations.

a. *Telephone Consumer Protection Act (TCPA)*

In the TCPA, Congress found that unrestricted telemarketing can be an intrusive invasion of privacy and that many consumers are outraged by the proliferation of intrusive calls to their homes from telemarketers. Pub.L. 102–243 at § 2 (Dec. 20, 1991). Therefore, Congress in the TCPA authorized the FCC to establish a national database of residential subscribers who object to receiving "telephone solicitations." *Id.* at § 3. A "telephone solicitation" was defined as a "telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services," excluding, inter alia, calls from a tax exempt nonprofit organization. *Id.* This definition excluded charitable telemarketers.

According to the legislative history accompanying the TCPA, "the record suggests that most unwanted telephone solicitations are commercial in nature. Complaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R.Rep. No. 102–317, at 16 (1991). The House Report cited statistical data from several states reporting that consumer complaints were directed mostly at commercial sales calls. *Id.* Moreover, the Committee found

that non–commercial calls were less intrusive to consumers because they are more expected and because there is a lower volume of non–commercial calls. *Id.* It concluded that "the two main sources of consumer problems–high volume of solicitations and unexpected solicitations–are not present in solicitations by nonprofit organizations . . . . It is on this basis that the Committee believes that the scope of the regulation is a workable 'commercial speech' distinction consistent with Supreme Court precedent." *Id.* at 16–17. This distinction between commercial and non–commercial telemarketing, justified in the TCPA, persists in all subsequent legislation and administrative rules regulating telemarketing calls.

b. *Telemarketing and Consumer Fraud and Abuse Prevention Act* (TCFPA)

In the TCFPA, Congress directed the FTC to prescribe rules prohibiting deceptive and abusive telemarketing acts and practices, including calls that a reasonable consumer would consider coercive or abusive of such consumer's right to privacy. Pub. L. 103–297 at § 3 (Aug. 16, 1994). Congress found that consumers lose an estimated $40 billion each year in "telemarketing" fraud and are victimized by other forms of "telemarketing" deception and abuse. *Id.* at § 2. Significantly, Congress in the TCFPA defined the term "telemarketing" as calls "conducted to induce purchases of goods or services,"–e.g., commercial calls. *Id.* at § 7. This is the Act under which the FTC enacted the national do–not–call regulations challenged in this case.

c. *1995 Telemarketing Sales Rule*

In 1995, acting pursuant to the TCFPA, the FTC established a company–specific do–not–call provision, which prohibited telemarketers from making sales calls to persons who had previously stated their desire not to receive such calls from that solicitor. Telemarketing Sales Rule, 60 Fed. Reg. 43842, 43854–55. This rule did not apply to an entity

such as a charitable organization that was not "organized to carry on business for its own profit or that of its members." *Id.* at 43843 n. 14. Accordingly, the distinction between commercial and non-commercial speech, first enacted in the TCPA, was present in the initial FTC Telemarketing Sales Rule. In justifying this rule, the FTC relied in part on the TCFPA and its legislative history, which emphasized that sellers of goods and services regularly subjected consumers to deception and abuse infringing upon their privacy rights. *Id.* at 43842. Moreover, the FTC later explained that when enacting this original Telemarketing Sales Rule it also considered the TCPA (which as noted above explicitly drew a distinction between commercial and non–commercial solicitations in its legislative history) and related FCC action. 68 Fed. Reg. at 4591.

d. *2003 Amended Telemarketing Sales Rule*

In its amended Rule (the subject of the instant litigation), the FTC established a national do–not–call registry that allowed individuals to block all commercial sales calls, with certain exceptions. 68 Fed. Reg. 4580, 4629. Most significantly to this case, the FTC preserved the distinction between commercial and non–commercial calls by limiting "coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations." *Id.* The "sellers of goods or services" limit relates back to Congress' findings in the TCFPA, which had documented a history of abuses specifically committed by telemarketers selling goods or services.

Importantly, the amended FTC Telemarketing Sales Rule did subject charitable organizations to the company–specific do–not–call provision. *Id.* In this amended Rule, the FTC retained the basic distinction between commercial and non–commercial calls already present in the earlier version of the

Telemarketing Sales Rule, although the amended rule resulted in stricter requirements for both categories of calls.

The FTC found that the original Rule's company–specific do–not–call list was inadequate to prevent the type of abusive commercial sales calls it was intended to prohibit. *Id.* at 4629, 4631. The FTC concluded that "[T]he registry is . . . designed to cure the inadequacies as a privacy protection measure that became apparent in the company–specific 'do–not–call' provisions included in the original Rule." *Id.* at 4635. For example, the FTC referred to complaints that commercial telemarketers ignored consumers' repeated requests to be placed on company–specific do–not–call lists. *Id.* at 4629.[7] It concluded that the national do–not–call list will also prevent fraud or abuse in some cases by protecting vulnerable consumers from exploitative telemarketers. *Id.* at 4635, n. 669.

Furthermore, the FTC specifically found that "fundamental differences between commercial solicitations and charitable solicitations may confer upon the company–specific 'do–not–call' requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising." *Id.* at 4637. Specifically, it reasoned that in an advocacy call, such as a charitable solicitation, a significant purpose of the call is to "sell" a

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[7] It is true that the FTC did not have comparable experience regarding whether a company–specific do–not–call list would be ineffective as to charitable callers because up to that point in time charitable callers had not been subjected to a company–specific do–not–call list. However, the fact that the FTC did not yet have a record as to the need to include charitable callers on a national do–not–call list does not mean that it could not at least address the problem as to which it did have an adequate record–that the more limited company–specific do–not–call list was ineffective to prevent invasions of privacy and abusive practices among *commercial* solicitors. *United States v. Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696 (noting the government is not required "to make progress on every front before it can make progress on any front").

cause, not simply to receive a donation. Therefore, the FTC found that it would be self–defeating for a non–commercial caller to engage in abusive telemarketing practices that invade personal privacy because such conduct could alienate the recipient against the cause the caller was attempting to promote. *Id.* "When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non–commercial speech is a different matter." *Id.* In enacting these provisions, the FTC cited both the TCFPA and the TCPA, noting that "Congress knowingly put the FTC on the same path that the FCC had trod." *Id.* at 4638.

e. *2003 FCC Rules and Regulations*

Finally, in July 2003, the FCC enacted regulations to "establish, with the Federal Trade Commission (FTC) a national do–not–call registry." 68 Fed. Reg. at 44144. Similar to the FTC's do–not–call regulations, the FCC list was not designed to apply to charitable callers. Citing the legislative history to the TCPA (which, as noted before, contained a congressional justification for distinguishing between commercial and non–commercial calls), the FCC reaffirmed that most unwanted telephone solicitations are commercial in nature and that charitable calls are less intrusive to consumers. *Id.* at 44153. The FCC rule also provided for a company-specific do–not–call system for consumers who elect not to register for the national list. *Id.* at 44155.

f. *Summary*

Congress expressly made factual findings in the TCFPA that telemarketing calls "conducted to induce purchases of goods or services" have subjected consumers to substantial fraud, deception, and abuse. Pub. L. 103– 297 at §§ 2, 7. Consequently, in enacting a national do–not–call registry, the FTC "decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods

or services." 68 Fed.Reg. 4629. Furthermore, the FTC's revised Telemarketing Sales Rule states that the agency relied on TCPA and FCC authority when it initially endorsed the distinction between commercial and non–commercial calls. *Id.* at 4591. The legislative history accompanying the TCPA, citing complaint statistics, found that commercial telemarketing intrudes upon personal privacy more than non–commercial telemarketing.

3. *The FTC's Likelihood of Success*

In light of this record, it appears that the FTC is likely to succeed on its argument that the distinction in the Amended Telemarketing Sales Rule between commercial and non–commercial phone solicitation passes muster under *Central Hudson*'s reasonable fit analysis. The line between these two types of speech is not drawn solely on the basis of the lesser degree of scrutiny applied to commercial speech. *See Discovery Network*, 507 U.S. at 428, 113 S.Ct. 1505. Rather, we examine the constitutionality of the distinction under the *Central Hudson* test with reference to the substantial governmental interest in preventing the greater risk of privacy invasion and abusive sales practices correlated with commercial telemarketing.

We find it relevant that the national do–not–call list is of an opt–in nature, which provides an element of private choice and thus weighs in favor of a reasonable fit. The list is not invoked until the homeowner makes a private decision to invoke it. *See Rowan*, 397 U.S. at 737, 90 S.Ct. 1484; *Playboy Entm't Group*, 529 U.S. at 815, 120 S.Ct. 1878. We also find it relevant that the FTC has not exempted non–commercial speech totally from all regulation, as consumers are also given some mechanism to block non–commercial solicitations by means of company–specific objections to solicitations by charitable organizations. And it is permissible for the FTC to act now to fix a problem upon which it has record support (the inadequacy of company–specific do–not–

call lists to prevent invasion of privacy and abusive practices in the context of commercial calls) without waiting until it can develop experience on whether or not a company–specific do–not–call list will be effective to prevent such abuses in the context of non–commercial telemarketing. *Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696. Finally, this is not a regulatory scheme that will only affect a "minute" portion of the problematic speech because the great majority of all telemarketing calls–and therefore the preponderant source of the problem of invasion of privacy and abusive calls–are commercial calls which are covered by the FTC's rule. *See Discovery Network*, 507 U.S. at 418, 113 S.Ct. 1505.

In the context of analyzing whether to stay the district court's injunction, we conclude there is a substantial likelihood that the FTC will be able to show a reasonable fit between the substantial governmental interests it asserted and the national do–not–call list or, in other words, that the list directly advances the government's substantial interests and is narrowly tailored. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343.

III. Conclusion

In light of our conclusions as to the three harm factors addressed above, we will stay the district court's order only if the FTC shows substantial likelihood of success on the merits. After reviewing the record and the parties' submissions, we are satisfied the FTC has met its burden.

We ORDER the district court's permanent injunction preventing implementation of the FTC's national do–not–call list stayed pending final resolution of this appeal on the merits. We further ORDER that the petition for review on the merits be expedited. The FTC shall file its opening brief on October 17. Mainstream Marketing shall file its responsive

brief on October 31. The FTC shall file any reply on November 7. Oral argument will be held in Tulsa, Oklahoma, on November 10, 2003.[8]

[8] We also GRANT the states' September 30 motion for leave to file a brief as amici and the additional states' October 1 motion to join the amici brief.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-9571

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; AMERICAN TELESERVICES ASSOCIATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

ORDER
Filed September 26, 2003

Before SEYMOUR, EBEL and HENRY, *Circuit Judges*.

PER CURIAM.

Petitioners seek review of an order of the Federal Communications Commission (FCC) adopting rules and regulations implementing the Telephone Consumer Protection Act of 1991 (TCPA). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144 (2003). Jurisdiction over this petition for review is vested in the federal court of appeals. 28 U.S.C. § 2342(1) (1994). Venue is appropriate in either the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 2343. Petitioners have

their principal office in Denver, Colorado, and venue is therefore appropriate in this court.

The only issue to be decided at this time is petitioners' request for a stay of certain provisions of the FCC's order pending review of the order on the merits. The order is scheduled to go into effect on October 1, 2003. Petitioners' request for stay is governed by Federal Rules of Appellate Procedure 8 and 18. To obtain a stay under these rules, petitioners must address the following four factors: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay is not granted; (c) the absence of harm to opposing parties; and (d) the risk of harm to the public interest. *See, e.g., Spain v. Podrebarac*, 68 F.3d 1246, 1247 (10th Cir. 1995); 10th Cir. R. 8.1.

Where the moving party has established the three "harm" factors, the "probability of success" requirement is relaxed somewhat. *See Lundgrin v.* Claytor, 619 F.2d 61, 63 (10th Cir. 1980). Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (14th Or. 1996) (quotation omitted).

We conclude, first, that petitioners have established they will suffer irreparable injury if a stay is not granted. The remaining two harm factors are conflated in this instance because the FCC is a governmental agency charged with protecting the public interest. We conclude that petitioners have failed to meet their burden on these remaining two factors, for two reasons. First, the public interest in respecting "residential privacy" weighs against a stay of the FCC's order. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). Second, the strong expectation interest of the many

millions of Americans who have registered with the FCC's "do not call" list weighs in favor of denying the stay.

Since petitioners have failed to establish that each of the harm factors tilts in their favor, they are required to show a substantial likelihood of success on the merits of their petition. On the record presented, we conclude that petitioners have failed to establish a substantial likelihood of success on the merits, and we therefore DENY the motion for stay of the FCC's order pending review of the merits.

The panel further orders that the petition for review on the merits be expedited, and that oral argument be scheduled on the petition at the earliest practical time. The clerk of this court is directed to establish a briefing and oral argument schedule consistent with this order to expedite the petition for review.

Entered for the Court
PATRICK FISHER, Clerk of Court

APPENDIX D

UNITED STATES DISTRICT COURT,
D. COLORADO

[Filed Sept. 29, 2003]

No. CIV.A.03–N–184 (MJW)

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; and AMERICAN TELESERVICES ASSOCIATION,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION
Defendant.

ORDER DENYING STAY OF JUDGMENT

NOTTINGHAM, *District Judge*.

This matter is before the court on "Defendant Federal Trade Commission's Motion for an Emergency Stay Pending Appeal," filed September 26, 2003. The motion asks this court to stay its order and judgment enjoining the FTC from enforcing its amended Rules (issued in December 2002) establishing and implementing a national do–not–call registry applicable to commercial telemarketers on October 1, 2003. *See* Mem. Op. & Order (D.Colo. Sept. 25, 2003) (hereinafter abbreviated as "Order"). The FTC simultaneously filed a Notice of Appeal from the Order and judgment. Procedurally, therefore, the matter is controlled by rule 62(c) of the Federal Rules of Civil Procedure, which provides, in pertinent part, as follows:

> When an appeal is taken from [a] . . . final judgment granting . . . an injunction, the court in its discretion may

> suspend . . . [or] modify . . . an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Since an agency of the United States has taken this appeal, however, "no bond, obligation, or other security shall be required from the appellant." Fed.R.Civ.P. 62(e).

In order to obtain a stay of an injunction pursuant to rule 62(c), the FTC, as the applicant, must persuade the court on the following issues:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776–77, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020–1021 (10th Cir.1996) (citing standard for preliminary injunction as applicable in evaluating motion to stay pending appeal); *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir.1974). The court will momentarily address each issue, although not in the numerical order enumerated in *Hilton*.

As a preliminary matter, it is pertinent to note that the purpose of a stay is to preserve the status quo pending appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020–1021 (10th Cir.1996) (citing standard for preliminary injunction as applicable in evaluating motion to stay pending appeal). There are three types of stays that are generally disfavored: (1) those that afford the moving party substantially all the relief it might recover after appeal on the merits, (2) those that disturb the status quo, and (3) those that are mandatory as opposed to prohibitory. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 n. 4 (10th Cir.2001) (applying

standard to issuance of preliminary injunction). These types of disfavored stays should not be granted unless the four factors weigh heavily and compellingly in favor of the stay. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154–55 (10th Cir.2001) (applying standard to issuance of preliminary injunction).

Here, the proposed stay would (1) afford the FTC all of the relief it would recover after appeal, (2) disturb the status quo, and (3) mandate that telemarketers comply with the do–not–call registry. If the Order is stayed, the FTC do–not–call registry will go into effect on October 1, 2003, and require telemarketers to pay fees for access to the registry. Telemarketers will be prohibited from calling telephone numbers on the list, which may result in significant lay offs of employees in the industry. This result gives the FTC all the relief it seeks on appeal. Additionally, this result disturbs the status quo and is mandatory because it requires telemarketers to abide by new rules that add significant regulatory burdens to the practice of telemarketing. Accordingly, the court concludes that the FTC must show that the four factors weigh heavily in favor of a stay of the Order pending appeal.

1. WOULD A STAY OF THE INJUNCTION SUBSTANTIALLY INJURE OTHER PARTIES INTERESTED IN THE PROCEEDING?

If the injunction is stayed and the FTC implements the do–not–call registry, as scheduled, on October 1, 2003, plaintiffs and other similarly–situated commercial telemarketers will effectively be prohibited from calling any number appearing on the registry. Plaintiffs identify two categories of injury which this prohibition will entail. First, it indisputably curtails their first amendment freedom to engage in commercial speech. This circumstance, standing alone, constitutes substantial and irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347,

373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), *quoting New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir.1999); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F.Supp. 1558, 1563 (M.D.Ala.1996).

The court must also consider a second category of injury alleged by plaintiffs. They contend that they and their employees will meet with concrete, significant economic harm if the court stays its injunction and allows the FTC to effect the do–not–call registry. Charitable groups seeking exemption from the do–not–call registry submitted opinion proof to the FTC that their potential donor pool would be reduced by forty to fifty percent if the registry applied to them. 68 Fed.Reg. 4634. This court, in its order of September 25, 2003, accepted an *estimate* that forty to sixty percent of telemarketing calls would be affected by the do–not–call registry. Mem. Op. & Ord., slip op. at 7, n.1. It is reasonable to believe that reductions of this magnitude would probably cause a corresponding loss of business to the industry and loss of jobs held by persons currently occupied in making the calls. Such monetary loss will never be remedied by an award of money damages, because the FTC cannot be ordered to post a bond, and plaintiffs' chances of prevailing in a damages lawsuit against the FTC for violating their constitutional rights appear minuscule, at best.

Although plaintiffs purport to quantify the loss by claiming that two million jobs will be lost, the court finds nothing in the record which justifies this specific inference. The court, however, must also evaluate plaintiffs' contention against what the FTC has offered in response—nothing. More importantly, the FTC cannot gainsay the general proposition that these plaintiffs, their employees, and other commercial telemarketers will suffer substantial economic injury if the FTC implements the do–not–call list, because it cannot

square such a denial with its current[1] claim that the registry will curtail eighty percent of unwanted telemarketing calls currently received by consumers. A preponderance of the evidence before the court shows that these plaintiffs, other similarly–situated commercial telemarketers, and persons employed by them will likely suffer devastating layoffs and other economic loss if the FTC implements the amended Rules as scheduled. There is no reason on this record to infer that employees can mitigate this loss by going to work for the charitable organizations and other groups exempted from the amended Rules. Moreover, because of the degree and nature of the probable injury, it will be difficult for plaintiffs to re-establish the *status quo ante* if the court allows the amended Rules to take effect, and appellate courts ultimately uphold the substance of this court's ruling, however inconceivable this outcome might be to the FTC and its supporters. It is unlikely, in such an event, that commercial telemarketers and their employees could simply re–group, dust themselves off, and proceed as they were before October 1, 2003.

2. WILL THE FTC SUFFER IRREPARABLE INJURY IF THE COURT WERE TO DENY THE MOTION TO STAY THE INJUNCTION?

The court concludes that the FTC itself will suffer no injury if the court refuses to stay its injunction, and the FTC does not argue to the contrary. Instead, it points to the

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[1] The FTC's estimate concerning the number of telemarketing calls which would be curtailed by the do–not–call list has crescendoed through the course of this lawsuit and taken on a life of its own with no reference to the factual record. The *current* eighty–percent estimate appears in the FTC's brief supporting its motion to stay. It appears that the estimate is an amalgam derived by assuming that the do–not–call registry would be applied to entities covered both by the Federal Communications Commission and by the FTC. There is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's ipse dixit, to support this amalgam. The court thus rejects it.

probability that, if it is enjoined from implementing the registry, plaintiffs and others will continue to invade the residential privacy of the millions of persons who have indicated a preference for protecting that privacy by placing their numbers on the do–not–call registry. It is not clear to the court whether this question should be taken up here or in its consideration of where the public interest lies. Finding no helpful case law, the court will consider it here. The court has already stated, in the Order filed September 25, 2003, that "[t]he government's interest in protecting the well–being, tranquility, and privacy of the home is of the highest order in a free and civilized society." Weighing that interest and comparing it to the substantial and irreparable injury which plaintiffs will suffer if the court's injunction were stayed requires the court to determine and characterize the intrusion on residential privacy at issue in this case.

The intrusion upon residential privacy at issue here is the ringing of a telephone. That ringing may be more frequent than the consumer would like. It may come at times which are inconvenient. It may be disruptive. Unlike junk mail or electronic spam, it cannot be dealt with at a time chosen by the recipient. It is invariably unwanted and adds to the stress of daily life. It is difficult to conceive, however, how it does economic damage or inflicts physical injury. The intrusion on residential privacy here is properly regarded as severe, vexatious annoyance and inconvenience—nothing more and nothing less.

It is also important that there are ways of limiting the intrusion even if there is delay in implementing the federal registry while the issues are on appellate review. The parties agree that, as of August 2002, twenty–seven states had no–call lists similar to the registry proposed by the FTC. *See* 68 Fed.Reg. 4630. While this may be no comfort to persons in states without such regulations, there is no basis to believe that existing system of regulation will collapse while the issues are being resolved by appellate courts.

Similarly, all other telemarketing rules promulgated by the FTC remain in effect, including the company–specific do–not–call rules. As the FTC has succinctly stated on its home page[2] *(http://www.ftc.gov)*:

> * Consumers who don't want to receive telemarketing calls can limit them by telling companies to put their number on the company's do not call list. Write down the name of the company and the date that you asked to be put on its do not call list. You should not receive further calls from that company. This provision of the Telemarketing Sales Rule is still in force (as are all non–do–call [sic] provisions of the Rule). The FTC and its state partners are committed to enforcing the company–specific provisions of the Rule.
>
> * The company–specific do not call rules apply to all telemarketing calls.

Finally, if the FTC's suggestions are unavailing, the annoyance and inconvenience of this telephonic intrusion can be reciprocated or countered by a range of perfectly–legal actions best characterized under the rubric "self–help." These actions, many of which should be so obvious as to require no enumeration, are limited largely by the recipient's imagination and the degree of civility or courtesy by which with which any recipient feels constrained (which, the court has reason to believe, may not be much). Undoubtedly, none of these actions can compare to the breathtaking ease of eliminating telephonic intrusions (by commercial telemarketers, only) with the fell stroke of enlisting on the do–not–call registry, but they underscore the point that the type of injuries advanced by the FTC in support of the motion to stay are simply not irreparable and cannot be compared to the economic and first amendment injuries on the other side of the

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[2] Because of the impermanence and malleability of information appearing on web sites, the court has extracted the FTC's home page as it existed on September 26, 2003 and attached it to this order, for the record.

scale. Moreover, in contrast to the economic injuries posited by plaintiffs and discussed above, injuries sustained because of a wrongly–entered injunction will promptly end if and when appellate review establishes the wrongfulness of the injunction and the FTC implements the do–not–call registry.[3]

3. HAS THE FTC SHOWN THAT THE PUBLIC INTEREST WOULD BE HARMED WERE THE COURT TO DENY THE MOTION TO STAY THE INJUNCTION?

According to the FTC, the "public interest" here consists of the strong expectation on the part of "[t]ens of millions of consumers," who have already placed their names and numbers on the do–not–call registry, that this would "put a halt to the dinnertime din of unwanted telemarketing." This is recognized to be important, and nothing this court has done should be viewed as denigrating this expectation. Placing to one side the demonstrably false and patently illogical premise that prohibiting calls from only *commercial* telemarketers will "halt" unwanted calls from the other telemarketers and other mass callers exempted from regulation by the FTC, the FTC's view of the public interest is too short–sighted and ephemeral. Something more is at stake here. It is appropriate to recall words written by James Madison (characterized in countless civics books as the Father of the Constitution) in marking "where the public interest lies." *Hilton*, 481 U.S. at 776, 107 S.Ct. 2113.

In *Federalist No. 51,* Madison wrote:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to

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[3] The court notes the United States Court of Appeals for the Tenth Circuit has ordered, in a parallel case brought by these plaintiffs against the Federal Communications Commission, "that the petition for review on the merits be expedited, and that oral argument be scheduled on the petition at the earliest practical time." *Mainstream Marketing Services, Inc. v. FCC*, Case No. 03–9571, slip op. at 3 (10th Cir. Sept. 26, 2003).

> guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

The Federalist Papers, No. 51, at 323–24 (New American Library ed.1961). Freedom of speech, no matter how unpopular or disagreeable the message, is a right of every minority (including telemarketers), no matter how strong the majority's clamor for limitation or restriction. In the court's view, the public interest, rightly understood, lies in vigilantly prohibiting governmental rules which burden one type of speech, but not others, when the evil which the rule maker purports to address is as likely to be caused by the favored speech as by the burdened speech, or when the rule maker burdens one type of speech but not others because it is expedient, politically–possible, or popular to do so. The public interest, including the interest of the millions who have coalesced to join the do–not–call registry, is served in the long run by enjoining such rules if the government has not drawn the line properly. Conversely, that public interest would be harmed beyond measure were the court to acquiesce in the FTC's constricted, majoritarian view of the matter.

4. HAS THE FTC MADE A STRONG SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL?

The FTC concedes that the court properly chose to apply the constitutional analysis set forth in *Central Hudson* to evaluate the constitutionality of the FTC's registry under the First Amendment. Under *Central Hudson*, truthful commercial speech concerning lawful activity may be regulated if: (1) the government asserts a substantial interest in support of the regulation; (2) the government demonstrates that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly tailored.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564–565, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S.Ct. 2371, 2376, 132 L.Ed.2d 541 (1995). According to the FTC, although the court properly found a substantial government interest in protecting consumer privacy in the home, the court improperly evaluated whether the registry materially advances the FTC's interest in protecting this privacy. (*Id.*)

In its Order, the court found that the registry fails to materially advance the FTC's interest in consumer privacy because it only applies to commercial telemarketing calls, despite the fact that noncommercial telemarketing calls are equally invasive to consumer privacy. (Order at 22–26.) Additionally, the court found that the FTC has failed to provide a valid reason or government interest in distinguishing between commercial and noncommercial speech. Because the registry distinguishes between the indistinct, therefore, the court found it unconstitutional.

In challenging the court's analysis of whether the registry materially advances the FTC's privacy interest, the FTC first side–steps and argues that it has demonstrated a different valid interest in distinguishing between commercial and noncommercial telemarketing calls. (Def.'s Br. at 3.) Specifically, the FTC claims that it found that charitable telemarketers are less likely than commercial telemarketers to engage in abusive telemarketing practices, such as ignoring consumers' requests to be placed on company specific do–not–call lists. (*Id.*)[4] The FTC's newly–devised justification

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[4] The FTC now claims that it was never referring to fraud when it refers to abusive telemarketing practices, but rather the failure to comply with the company–specific do–not–call list. The FTC does, however, in both its brief and the administrative record, list fraud as one its reasons for distinguishing between commercial and noncommercial telemarketing in the application of the registry. (68 Fed.Reg. 4635 (January 29, 2003); Defs.' Mot. for Summ. J. at 28 [stating that not–for–profit corporations

finds no support in the evidence. The FTC claims that it came to this new conclusion based on its past experience with the company–specific do–not–call lists, which have applied to commercial telemarketers, *but not charitable and political telemarketers*, for the past eight years. (*Id.*) Because of the limited application of the company–specific requirements, *the FTC has gathered no evidence* concerning the issue of whether noncommercial telemarketers will fail to enforce company–specific do–not–call lists as those entities have been exempt from such requirements until recently. (*Id.*) The FTC's argument is not persuasive.

The FTC found that the company–specific do–not–call requirements were insufficient to protect consumer privacy. Although the company–specific requirements have applied solely to commercial telemarketers for the past eight years, the FTC cites no real evidence that it is the commercial nature of the calls which caused the company–specific requirements to fail in protecting consumer privacy. Instead, the FTC found:

> the company–specific approach is extremely burdensome to consumers, who must repeat their "do–not–call" request with every telemarketer that calls; consumers' repeated requests to be placed on a "do–not–call" list are ignored; consumers have no way to verify that their names have been taken off a company's calling list; consumers find that using the TCPA's private right of action is very complex and time–consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when; and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.

68 Fed.Reg. at 4629 (January 29, 2003) (cited by FTC in Def.'s Br. at 3). The problems with the company–specific

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and political fundraisers "are less likely to engage in the sorts of . . . deceptive acts or practices prohibited by the Telemarketing Act"].)

method create no basis upon which to distinguish between commercial and noncommercial speech in enactment of the do–not–call registry. Rather, the problems go to the nature of the company–specific method itself, as opposed to commercial telemarketers' reactions to the requirements.

Furthermore, even if the problems with the company–specific method related directly to commercial telemarketers' behavior, such problems would still not form the proper basis for distinction between commercial and noncommercial telemarketing in the registry. Basically, the FTC claims it can distinguish between commercial and noncommercial speech in the application of the registry because the FTC has no evidence from past experience that noncommercial telemarketers will behave like commercial telemarketers. Of course, the FTC has never attempted to regulate noncommercial telemarketers. The FTC's argument to advance its distinction between commercial and noncommercial speech is, therefore, a "we don't know," interest, founded on the government's own ignorance. The government body seeking to sustain a restriction on speech cannot satisfy this burden with speculation or conjecture but must demonstrate that the harm is real. *Edenfield v. Fane*, 507 U.S. 761, 770–771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993). Here, the FTC has not demonstrated that its interest justifies a distinction between commercial and noncommercial speech; instead, it speculates that the interest does.

Additionally, the FTC's argument is circular. It asserts that, because the FTC has always made illogical distinctions based on the content of speech in its telemarketing rules, it can continue to make these distinctions. The FTC cannot bootstrap a substantial government interest from its own previous regulatory behavior to justify content–discrimination under the First Amendment. Accordingly, the FTC's interest in improving upon its company–specific do–not–call method

does not justify a distinction between commercial and non-commercial telemarketing.[5]

Secondly, the FTC claims it has a likelihood of success on appeal because the court improperly analyzed *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). (Def.'s Br. at 4.) Specifically, the FTC claims that *Discovery Network* does not require the FTC to justify the exclusion of noncommercial speech from the registry's coverage through a reason related to the interest the registry is seeking to further. (*Id.*) According to the FTC, the court in *Discovery Network* found the regulation unconstitutional solely because of the minuscule percentage of news racks affected by the regulation in relation to the city's asserted goal, as opposed to the content–based distinction made by the regulation. (*Id.*)

The FTC is correct that the court found the regulation at issue in *Discovery Network* unconstitutional partly because it only achieved a numerically insignificant reduction in the number of news racks in the city. *Discovery Network*, 507 U.S. at 417, 113 S.Ct. at 1510. According to the Court, therefore, the city had not materially advanced its interest in beautification. The Court, however, also noted, "[n]ot only does Cincinnati's categorical ban on commercial news racks place too much importance on the distinction between com-

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[5] In a footnote, the FTC argues that another reason for its distinguishing between commercial and noncommercial telemarketing is that Congress found noncommercial telemarketing to be less intrusive to privacy when enacting the TCPA. In the administrative record, however, the FTC specifically found that all telemarketing calls, whether commercial or noncommercial, are intrusive to consumer privacy. 68 Fed.Reg. at 4637. Nowhere did the FTC find that noncommercial calls are less intrusive. Because under intermediate scrutiny the court may only consider those government interests asserted by the government, *Edenfield v. Fane*, 507 U.S. at 768, 113 S.Ct. at 1798, interests asserted by Congress under the TCPA are irrelevant to the constitutionality of the FTC's amended Rules.

mercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." *Discovery Network*, 507 U.S. at 424, 113 S.Ct. at 1514. It further stated, "Cincinnati has not asserted an interest in preventing commercial harms . . . , which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id.* at 426, 113 S.Ct. at 1515. Based on *Discovery Network*, therefore, the government interest asserted must bear some relationship to the distinction between commercial and noncommercial speech. Accordingly, this court finds *Discovery Network* does not indicate that the FTC has a likelihood of success on appeal.

Third, the FTC claims that the court failed to consider how lightly the do–not–call registry restricts speech, considering that consumers themselves choose whether to sign–up for the list. (Def.'s Br. at 4.) The court, however, did consider this characteristic of the registry in its Order when evaluating it under *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). As set forth in the Order, the FTC's actions sufficiently entangle the government in consumers' choices so as to implicate the First Amendment and require the government to demonstrate a substantial government interest for its distinction between commercial and noncommercial telemarketing. (Order at 19 [citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000)].) The FTC's attempt to re–hash the same argument does not demonstrate a likelihood of success on appeal of the registry's constitutionality.

Finally, the FTC argues that it has a likelihood of success on appeal because the court failed to consider cases from other circuits where courts upheld content–based distinctions in the commercial speech context. (Def.'s Br. at 5–8 [citing *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir.2003);

Anderson v. Treadwell, 294 F.3d 453 (2d Cir.2002); *Trans Union Corp. v. Fed. Trade Comm'n*, 267 F.3d 1138 (D.C.Cir.2001)].) The cases are distinguishable and do not show the FTC has a likelihood of success on appeal.

First, in the *Anderson* case, the Second Circuit reviewed the constitutionality of a New York statute that (1) prohibited real estate solicitations in areas that the Secretary of State determined had significant problems with intense and repeated solicitations by real estate brokers, and (2) enforced a do–not–solicit list of those individuals who did not want to be disturbed by real estate brokers. *Anderson*, 294 F.3d at 453. Although the Second Circuit found the statute constitutional under the First Amendment, *Anderson* is distinguishable from this case. The government in *Anderson* asserted an interest in privacy, as the FTC has in this case. *Anderson*, 294 F.3d at 461. However, in *Anderson* the New York Legislature had determined that real estate solicitations were a unique problem to consumer privacy, over and above other commercial solicitations, due to the phenomenon known as "blockbusting." *Id.* at 462. "Blockbusting" is a practice whereby real estate brokers engage in aggressive solicitation of homeowners by fanning racial tensions and promoting panic–selling. *Id.* at 457. The court, therefore, found that the government had a reason related to its interest to distinguish between different types of commercial speech, unlike the FTC in this case. In fact, the Second Circuit explicitly distinguished *Anderson* from *Discovery Network* on this basis and found that a distinction between types of commercial speech based on a legitimate reason is unlike a distinction between commercial and noncommercial speech for First Amendment purposes. *Id.* at 463–464. Here, the FTC has not demonstrated that commercial telemarketing calls are a unique problem over and above noncommercial telemarketing calls. Rather, the FTC has conceded just the opposite. 68 Fed.Reg. 4637. Because Anderson is distinguishable from

this case, therefore, it does not show that the FTC has a likelihood of success on appeal.

Similarly, *Trans Union Corporation* is distinguishable from this case. In *Trans Union Corporation*, the District of Columbia Circuit upheld the constitutionality of a provision in the Fair Credit Reporting Act ("FCRA"), which permitted the sale of consumer reports to facilitate offers of credit or insurance but not to facilitate offers of other goods or services. *Trans Union Corp.*, 267 F.3d at 1138. The FTC in *Trans Union Corporation* asserted an interest in protecting personal financial data, while facilitating credit pursuant to the purpose of FCRA. *Id.* at 1142–1143. The District of Columbia Circuit found that the interest in protecting personal data while facilitating credit entirely supported the distinction between offers of credit and offers of goods and services. *Id.* at 1143. Unlike in this case, therefore, the government interest supported the distinction between different types of speech. Additionally, *Trans Union Corporation* only dealt with distinctions between types of commercial speech, as opposed to commercial and noncommercial speech as in this case. Accordingly, because the *Trans Union Corporation* case is readily distinguishable from this case, it does not show that the FTC has a likelihood of success on appeal.

Finally, in the *American Blast Fax* case, the Eight Circuit upheld the constitutionality of a provision in the Telephone Consumer Protection Act ("TCPA"), which bans unsolicited, commercial facsimiles but not unsolicited, noncommercial facsimiles. *Am. Blast Fax, Inc.*, 323 F.3d at 649. The government asserted an interest in preventing unwanted facsimile advertising from shifting advertising costs to unwilling consumers and interfering with the reception of their facsimile machines. *Id.* at 654. Additionally, the government noted, as a basis for distinguishing between commercial and noncommercial speech, that Congress had found, in enacting

the TCPA, that noncommercial calls are less intrusive to consumers than commercial calls because they are more expected. *Id.* at 655–656. The Eighth Circuit, deferred to this congressional finding. Here, in contrast, the court has found that the FTC has no valid reason to distinguish between commercial and noncommercial telemarketing. *See* discussion at n. 5 *supra*. The FTC cannot concoct a reason through speculation or conjecture but must demonstrate that the harm of commercial speech when compared to noncommercial speech is real. *See Edenfield,* 507 U.S. at 770–771, 113 S.Ct. at 1800.

The Seventh Circuit's analysis in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir.1998) is the most persuasive case to this court in determining the FTC's likelihood of success on appeal. In *Pearson*, the Illinois Legislature passed a statute creating a do–not–solicit list prohibiting real estate brokers from soliciting homeowners who put their names on the list. *Id.* at 399. Illinois asserted an interest in protecting consumer privacy and ending "blockbusting." *Id.* at 402. Instead of accepting Illinois' conjecture that "blockbusting" was a unique problem justifying a distinction between real estate and other commercial solicitations, the court found that Illinois had demonstrated no evidence that "blockbusting" occurred with any frequency in Illinois. *Id.* The Seventh Circuit found, therefore, that the only valid interest asserted by the government to justify its content–based distinction was the concern for consumer privacy. *Id.* Because other commercial solicitations are as intrusive to consumer privacy as real estate solicitations, the court struck down the statute as unconstitutional. *Id.* at 405. Since *Pearson* is the case most analogous to the case before the court, the court finds that no authority from other circuits supports the FTC's assertion that it has a likelihood of success on appeal. Accordingly, the court holds that this factor in determining whether to grant a stay of the court's Order weighs against granting a stay.

5. CONCLUSION

Two matters must be addressed before this order is filed. First, as an overall justification for its motion, the FTC relies heavily on an unpublished Order entered September 26, 2003, by the United States Court of Appeals for the Tenth Circuit in *Mainstream Marketing Services, Inc. v. FCC*, Case No. 03–9571 (10th Cir. Sept. 26, 2003). There, in a parallel case brought by these plaintiffs to review do–not–call rules propounded by the Federal Communications Commission, the Tenth Circuit denied plaintiffs' request for a stay of the FCC's rules pending the appellate court's review on the merits. According to the FTC, the ruling controls the outcome of this case.

The court is mindful and respectful of an order entered by a panel of the court which will decide the issues presented on appeal of this case. Because the Order is apparently unpublished, however, it is not binding in the sense that a published opinion is binding. *See* 10th Cir. R. 36.3. More important, the FTC's argument overlooks the entirely different procedural posture of the two cases. It does not appear that the matter before the Tenth Circuit has been argued on the merits or even briefed. *See Mainstream Marketing Services, Inc. v. FCC*, Case No. 03–9571, slip op. at 3 (10th Cir. Sept. 26, 2003) (ordering expedited argument and briefing). In contrast, this court has had the benefit of extensive briefing and an opportunity to address the merits of the case. It has also reviewed the FTC's administrative record and factual materials submitted by the parties on cross–motions of summary judgment. It is not clear whether any administrative record is currently before the appellate court. Indeed, because the FTC has taken the lead on the issue, it is not clear whether the FCC made a separate record or relied to some extent on the FTC record. Finally, it does not appear that the parties made available to the Tenth Circuit the information available to this court on the issues of irreparable

injury to plaintiffs, injury to others, and the public interest which is before this court. Because of this different procedural context, the court declines the invitation to give the appellate Order controlling effect here.

There is a second matter which the court must address before concluding this order. Citing news reports, plaintiffs suggest that the FTC is violating the September 25, 2003 Order by continuing to solicit persons to sign up for the national registry. Plaintiffs also claim that the FTC is attempting to side–step the Order by providing its registry to the FCC for implementation on October 1, 2003. The court regards the terms of its injunction and judgment as reasonably clear and specific: the FTC is prohibited from "creating and implementing" its do–not–call registry. The court assumes that the FTC is familiar with the substantial body of case law to the effect that a person enjoined cannot do indirectly through another what it is prohibited from doing directly. The FTC has appealed this court's ruling, as is its legal right, and the court will not assume, on the basis of news reports, that it will risk collateral proceedings by also trying to skirt the Order.

Upon the foregoing findings and conclusions, it is ORDERED that Defendant Federal Trade Commission's Motion for an Emergency Stay Pending Appeal is hereby DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
D. COLORADO

[Filed Sept. 25, 2003]

No. CIV. A. 03 N 0184

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; and AMERICAN TELESERVICES ASSOCIATION,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION; TIMOTHY J. MURIS, Chairman of the FEDERAL TRADE COMMISSION, in his official capacity; SHEILA F. ANTHONY, Commissioner, FEDERAL TRADE COMMISSION, in her official capacity; MOZELLE W. THOMPSON, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; Orson Swindle, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; THOMAS B. LEARY, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; and J. HOWARD BEALES III, Director, Bureau of Consumer Protection, in his official capacity,

Defendants.

MEMORANDUM OPINION AND ORDER

NOTTINGHAM, *District Judge*.

This case concerns the validity and constitutionality of the Federal Trade Commission's amended Telemarketing Sales Rules (hereinafter "amended Rules"). The amended Rules create a federal registry consisting of names and telephone

numbers of consumers who have indicated, by placing their name and number on the registry, that they do not wish to receive unsolicited telephone calls from those marketers to whom the amended Rules apply. This is commonly known as a do–not–call registry because the amended Rules prohibit certain types of telemarketers from calling those telephone numbers. The amended Rules also prohibit calls that, to make mass calling more efficient, are dialed by equipment and subsequently dropped when answered by the consumer because the salesperson is delayed on a previous call. These calls are denominated in the telemarketing industry as abandoned calls.

Plaintiffs allege that, when the FTC promulgated the amended Rules, it (1) violated the First and Fifth Amendments to the United States Constitution; (2) exceeded its statutory authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C.A. §§ 6101–6108 (West 1998 & Supp.2003) (hereinafter "Telemarketing Act"); and (3) acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C.A. § 551 (West 1996 and Supp.2003) ("APA"). This matter is before the court on (1) "Plaintiffs' Motion for Summary Judgment," filed May 2, 2003, (2) "Defendants' Cross–Motion for Summary Judgment," filed May 30, 2003, and (3) the parties' "Consent Motion for Leave To Amend Complaint," filed August 5, 2003. Because it is uncontested and plainly proper under the federal rules, the motion to amend will be granted without discussion. Jurisdiction is based on the existence of a federal question. *See* 28 U.S.C.A. § 1331 (West 1993 & Supp.2003).

FACTS

1. Factual and Statutory Background

Many different organizations, including businesses, charities, religious groups, and political parties, generate revenue by calling individuals in their homes and soliciting sales and donations. This practice, known as telemarketing, has grown

into an industry that generates $275 billion dollars annually and employs roughly 5.4 million persons in the United States. (Mem. Supp. Pls.' Mot. for Summ. J. at 7 [filed May 2, 2003] [hereinafter "Pls.' Br."]) Organizations perform their telemarketing activities in a variety of ways. Some utilize their own employees or volunteers to perform telemarketing activities. Others hire independent telemarketing companies that operate call–centers to make solicitations on their behalf. Plaintiffs Mainstream Marketing and TMG are independent telemarketing companies based in Colorado. (First Am. Compl. for Decl. and Inj. Relief ¶¶ 14, 17–18 [filed August 5, 2003] [hereinafter "Am. Compl."].) Plaintiff American Teleservices Association is a national non–profit association of telemarketing companies which represents its members' commercial interests and engages in self–regulation of the industry. (*Id.* ¶ 19; Pls.' Br. at 8.)

In 1991, Congress passed the Telephone Consumer Protection Act of 1991 ("TCPA"), wherein it granted the Federal Communications Commission the authority to promulgate rules creating a procedure to protect telephone subscribers from receiving unwanted telemarketing calls. 47 U.S.C.A. §§ 227(c)(1)(A)–(E), (c)(3) (West 2001 & Supp. 2003). The TCPA suggests the creation of a national database as a method of preventing subscribers' reception of unwanted calls, but it does not require the FCC to implement such a do–not–call list. *Id.* By its own terms, the TCPA prohibits telemarketers from (1) using automatic telephone dialing systems to make calls or send prerecorded messages to emergency lines, hospital and elderly home lines, and cellular telephone lines, and (2) making any calls with prerecorded messages to any line unless the FCC chooses to exempt the particular type of telemarketer making the call. *Id.* § 227(b)(1)(A). Finally, the TCPA grants the FCC the limited authority to exempt telemarketers making

> calls that are not made for a commercial purpose; and such . . . calls made for a commercial purpose that the

> Commission determines will not adversely affect the privacy rights that this section is intended to protect, and do not include the transmission of any unsolicited advertisement.

Id. § 227(b)(2)(B). As of January 2003, when this case was filed, the FCC had utilized this grant of authority to pass rules creating company–specific do–not–call lists and prohibiting use of automatic telephone dialers and prerecorded messages, but it had not yet adopted rules creating a national database for a do–not–call registry. 47 C.F.R. § 64.1200 (2002).

In 1994, Congress enacted the Telemarketing Act, wherein it granted the FTC the authority to promulgate rules prohibiting "deceptive or abusive telemarketing practices." 15 U.S.C.A. § 6102. Congress specifically found that consumers were being increasingly victimized by telemarketing fraud and other abuses, and it required the FTC in promulgating its rules to (1) define "deceptive telemarketing acts or practices," (2) prohibit abusive patterns of unsolicited telephone calls, (3) restrict the hours of the day when telemarketing calls may be placed, and (4) require telemarketers to promptly disclose to call recipients the nature of their call. *Id.* § 6102(2)–(3). In response to this mandate, the FTC adopted the Telemarketing Sales Rules (the "Rules") on August 16, 1995. 16 C.F.R. Part 310; 60 Fed.Reg. 43842 (August 23, 1995). These Rules prohibit credit card laundering, mandate prompt disclosure of the nature of the call, and prohibit, among other things, threatening or repetitive calls 16 C.F.R. §§ 310.3, 310.4 (2003).

On two occasions in 2002, the FTC proposed revisions to the Rules. In January 2002, the FTC issued a notice of proposed rule making, suggesting a revision of the Rules and the creation of a do–not–call registry. 67 Fed.Reg. 4492 (January 30, 2002). In May 2002, the FTC issued another notice of proposed rule–making which would further amend the Rules to impose fees on telemarketers for access to the do–not–call registry. 67 Fed.Reg. 37362 (May 29, 2002).

In December 2002, the FTC issued the amended Rules which are the subject of this case. The amended Rules prohibit "deceptive or abusive telemarketing acts or practices." 16 C.F.R. § 310.4(b). Included among the definitions of an "abusive telemarketing act"is the following:

> initiating any outbound telephone call to a person when . . . that person's telephone number is on the 'do–not–call' registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls *to induce the purchase of goods or services* . . . .

Id. § 310.4(b)(1)(iii)(B)(emphasis added). Under the amended Rules, consumers may add their names and telephone numbers to a registry of numbers. *Id.* All telemarketers are prohibited from making calls to numbers on the registry to induce the purchase of goods and services. *Id.* An exception is made for businesses that have obtained prior written consent from the consumer, or have "an established business relationship" with the consumer, defined as a business transaction occurring in the previous eighteen months. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i)–(ii). Also ex-empted from the do–not call requirements are those businesses beyond the jurisdictional reach of the FTC, including banks, insurance companies, and common carriers. 15 U.S.C.A. § 6105. Finally, the amended Rules contain an exemption which is critical to this case. They exempt from the do–not–call registry organizations soliciting charitable contributions. 16 C.F.R. § 310.6(a).

The amended Rules also define abusive telemarketing practices as

> abandoning any outbound telephone call. An outbound telephone call is 'abandoned' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

Id. § 310.4(b)(1)(iv). A telemarketer is allowed to abandon the occasional call under the amended Rules if

> the telemarketer employs technology that ensures abandonment of no more than three (3%) percent of all calls answered by a person, measured per day per calling campaign, and whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed.

Id. § 310.4(b)(4)(i)–(ii). The amended Rules go into effect on October 1, 2003. (Pls.' Br., Statement of Undisputed Material Facts ¶ 13); *admitted at* Defs.' Mem. of Points and Authorities in Supp. of its Cross–Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J., Resp. to Statement of Undisputed Material Facts ¶ 13 [filed May 30, 2003] [hereinafter "Defs.' Br."].

In promulgating the amended Rules, the FTC sought to protect the consumer's right to privacy in his own home and the right to be free from unwanted telephone calls. 68 Fed.Reg. at 4635. To that end, the FTC established the do–not–call registry requirements for all *commercial* telemarketing calls. *Id.* at 4635. Specifically, the FTC found that the previous company–specific do–not–call rules, which permitted a consumer to request that his name be removed from a company's call list, were insufficient to protect consumers from unwanted calls for several reasons. *Id.* at 4629. First, the FTC found that telemarketers interfered with consumers' attempts to be placed on company–specific lists by hanging up on them or ignoring their request. *Id.* Additionally, the FTC noted that (1) the prior practice placed too much burden on consumers who had to repeat their do–not–call request with every telemarketer who called; (2) the company–specific list continually exposed consumers to unwanted initial calls

which had significantly increased in numbers since adoption of the original FTC Rules; and (3) consumers had no method to verify that their name had been removed from the company's list. *Id.*

As noted previously, the FTC exempted charitable organizations from the do–not–call requirements. In doing so, it cited the heightened First Amendment protection afforded charitable speech. *Id.* at 4586, 4635 Additionally, the FTC found that abusive telemarketing practices, which the registry sought to combat, were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. *Id.* at 4635, 4637. The FTC admitted, however, that the interest of protecting privacy did not justify a distinction between commercial and charitable telemarketing calls because privacy was equally invaded regardless of the speech content of the telephone call. *Id.* Estimates indicate that forty to sixty percent of telemarketing calls will be affected by the do–not–call list.[1] (Pls.' Br. at 10; Pls. Reply at 27.)

On March 11, 2003, after the FTC announced its amended Rules, Congress enacted the Do–Not–Call Implementation Act ("Implementation Act"). Pub.L. No. 108–10, 7 Stat. 557 The Implementation Act provides

> The Federal Trade Commission may promulgate regulations establishing fees sufficient to implement and

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[1] There is no exact estimate of the number of calls that will be reduced in the administrative record or elsewhere. There are estimates, however, of the percentage reduction of telemarketing business and employment. The FTC faults the telemarketing industry for refusing to provide the FTC with the information necessary to estimate the percentage reduction in calls. Plaintiffs fault the FTC for failing to engage in proper research of the issue before promulgating the regulations. For purposes of this ruling, the court will consider the telemarketing industry's estimate of percentage reduction in business as the proper measure of the do–not–call registry's effect on telemarketing calls.

> enforce the provisions relating to the 'do–not–call' registry of the Telemarketing Sales Rule (16 C.F.R. § 310.4(b)(1)(iii)), promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§ 6101 et seq.). . . . Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. §§ 227 et. seq.). In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. § 310.4(b)).

Id. Pursuant to the Implementation Act and the Telemarketing Act, the FTC, on April 3, 2003, announced its intention to charge a fee to companies subject to the FTC's do–not–call registry for access to the numbers on the registry. 68 Fed.Reg. 16238 (April 3, 2003).

Similarly, pursuant to the Implementation Act and the TCPA, the FCC recently announced its intention to adopt rules similar to the FTC's, enforcing the do–not–call list. On July 25, 2003, the FCC promulgated rules mirroring the FTC's amended Rules and adding entities subject to the do–not–call restrictions, to include those beyond the reach of the FTC's jurisdiction, such as banks, insurance companies, and common carriers. 68 Fed.Reg. 44144 (July 25, 2003); 47 C.F.R. 64.1200 (2003). The FCC do–not–call rules, like the FTC's, do not apply to entities making calls on behalf of nonprofit organizations. *Id.* § 64.1200(f)(9).

On July 31, 2003, the FTC promulgated its final rule concerning the fees imposed on entities accessing the national do–not–call registry, to be codified at 16 C.F.R. § 310.8 (2003). 68 Fed.Reg. 45134 (July 31, 2003). These new fee Rules provide that any seller wishing to initiate, or cause any

telemarketer to initiate, an outbound telephone call to any person in a particular area code, must first pay a fee for access to the do–not–call registry pertaining to that area code. 16 C.F.R. § 310.8(a). The rules further states:

> The annual fee . . . is $25 per area code of data accessed, up to a maximum of $7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in, or causing others to engage in, outbound telephone calls to consumers and who is accessing the National Do–Not–Call Registry without being required under this Rule, 47 C.F.R. § 64.1200, or any other federal law.

Id. § 310.8(a).

2. Procedural Background

Plaintiff filed a complaint in this court for declaratory and injunctive relief on January 29, 2003, seeking an injunction prohibiting the FTC's application and enforcement of its amended Rules. (Compl. for Decl. and Inj. Relief [filed January 29, 2003] [hereinafter "Compl."].) On February 28, 2003, plaintiffs filed a motion for a preliminary injunction, arguing that their likelihood of success in their case mandated issuance of a preliminary injunction. (Pls.' Mot. for Prelim. Inj. [filed February 28, 2003] [hereinafter "Mot. for Prelim. Inj."].) Plaintiffs withdrew this motion on May 23, 2003, after filing their motion for summary judgment on May 2, 2003. (Notice by Pls. of Withdrawal of Pls.' Mot. for Prelim. Inj. [filed May 23, 2003]; Pls.' Br.)

On August 5, 2003, plaintiffs filed a consent motion to amend their complaint to state claims against the FTC based on the new fee Rules and to withdraw all claims against individual defendants, other than the FTC. (Consent Mot. for Leave To Am. Compl. [filed August 5, 2003] [hereinafter "Mot. to Am. Compl."].) In their proposed first amended

complaint, plaintiffs allege that the fee violates the First Amendment and the APA. (Am. Compl. ¶¶ 172–182.) At a status conference on August 11, 2003, the court allowed the parties an opportunity to supplement their cross–motions for summary judgment, based on the new claims asserted in plaintiffs' proposed amended complaint. On August 21, 2003, plaintiffs and defendants filed supplemental memoranda supporting their opposing positions regarding the lawfulness of the FTC's new fee Rules. (Supplemental Mem. Supp. Pls.' Mot. for Summ. J. [filed August 21, 2003] [hereinafter "Pls.' Supp. Br."]; Defs.' Mem. of Points & Authorities in Supp. of its Mot. for Summ. J. with Respect to Counts 9–11 of the First Am. Compl. [filed August 21, 2003] [hereinafter "Defs.' Supp. Br."].)

ANALYSIS

In their motion for summary judgment, plaintiffs dub the amended Rules an act of "regulatory imperialism," which borrows from the reasoning of the pigs in George Orwell's "Animal Farm." (Pls.' Br. at 2, 31 ["Some animals are more equal than others"]) Specifically, plaintiffs argue that the amended Rules concerning the do–not–call registry and fees violate the First and Fifth Amendments by (1) imposing a prior restraint on speech, (2) discriminating based on speech content, and (3) failing to forward a substantial interest, materially advance the state's interest, or create narrowly tailored remedies. (Pls.' Br. at 23–48; Pls.' Supp. Br. at 13–25.) Secondly, plaintiffs claim that the FTC does not have authority from Congress under the Telemarketing Act to promulgate the amended Rules because the creation of a do–not–call registry and regulation of abandoned calls were powers specifically granted to the FCC under the TCPA, not the FTC under the Telemarketing Act. (Pls.' Br. at 48–59.) Plaintiffs finally argue that the FTC's promulgation of the amended Rules and fee provisions was arbitrary and capricious because the rules are unsupported by the record

and comments that were before the FTC at the time of promulgation. (*Id.* at 59–67; Pls.' Supp. Br. at 25–28.)

Defendants filed a response to plaintiffs' motion for summary judgment and their own motion for summary judgment on May 30, 2003. (Defs.' Br.) Defendants counter that the amended Rules pass First Amendment constitutional muster under the test for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). (*Id.* at 18, 23–37.) Additionally, defendants claim the Telemarketing Act does grant the FTC the authority to create a do– not–call registry and regulate abandoned calls. (*Id.* at 14–17, 44–49.) Defendants finally claim that the FTC's promulgation of the amended Rules was not arbitrary and capricious because the FTC considered over 64,000 comments and made clear findings justifying the amended Rules in the rulemaking record at 68 Fed.Reg. at 4580–4679. (*Id.* at 38–43.)

1. Standard for Summary Judgment & Review of Agency Action

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for

trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. at 2554). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553; *see* Fed.R.Civ.P. 56(e).

A genuine issue of fact does not exist, and summary judgment is appropriate, if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. If the nonmoving party's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249, 106 S.Ct. at 2511 In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one–sided that one party must prevail as a matter

Id. at 252, 106 S.Ct. at 2512. The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La–Z–Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.1985). Additionally, the court, when ruling on a motion for summary judgment, must construe the facts in the light most favorable to the nonmoving party. *Id.* Here, the parties agree that there is no dispute as to any material fact and that summary judgment is appropriate as a matter of law. Accordingly, this court's role is to apply the law to the undisputed facts.

When a court reviews agency action, the reviewing court shall

> hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right
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> * * * *

5 U.S.C.A. § 706(2)(A)–(C) (West 1993 & Supp.2003). Here, the court is called upon to review the FTC's actions under the Constitution, statute, and the APA. Accordingly, the court is mindful of separate and distinct standards of review in this case. Each standard is addressed in turn.

2. *First Amendment*

Plaintiffs claim that the rules creating the do–not–call registry and establishing fees to access the registry violate the First Amendment to the United States Constitution. Under the APA, the court must therefore determine whether the FTC's rules are "contrary to constitutional right." 5 U.S.C.A. § 706(2)(B); *U.S. West, Inc. v. Fed. Communications Comm'n*, 182 F.3d 1224, 1231 (10th Cir.1999), *cert denied sub nom. Competition Policy Inst. v. U.S. WEST, Inc.*, 530 U.S. 1213, 120 S.Ct. 2215, 147 L.Ed.2d 248 (2000). In contrast to the situation where a rule is asserted to be improper when measured against the enabling statute, the court owes no deference to the agency's position that the rule is a permissible interpretation of the Constitution. *See, e.g., Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10th Cir.1989); *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). If the court determines that the amended Rules violate the First Amendment, they must be invalidated.

The FTC's do–not–call registry provides consumers with a procedure by which to refuse and prevent all commercial calls by telemarketers to their residential phone line. 16 C.F.R. § 310.4(b). By signing up for the do–not–call list, a consumer indicates he will not accept commercial calls by telemarketers. A consumer cannot use the list, however, to prevent calls from charitable organizations or businesses with which the consumer has had a relationship in the past eighteen months. *Id.* § 310.6(a). Instead, the consumer must independently notify these entities that the consumer does not wish to receive calls from them. In this regard, the FTC has

established a mechanism by which a consumer may refuse commercial, but not other types of, speech.

Commercial speech is defined as speech that proposes a financial transaction. *Central Hudson*, 447 U.S. at 562, 100 S.Ct. at 2349. There is no doubt that the First Amendment protects this type of speech from unwarranted government regulation. *Id.* at 561, 100 S.Ct. at 2350. The First Amendment's concern for commercial speech is based on the informational function of advertising. *Id.* at 563, 100 S.Ct. at 2350. "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561–562, 100 S.Ct. at 2349. In applying the First Amendment to commercial speech, the Supreme Court has rejected the highly paternalistic view that the government should be involved in assessing the value of, and determining, what consumers should and should not hear. *Id.; Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993). This view stems from a belief that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–482, 115 S.Ct. 1585, 1589, 131 L.Ed.2d 532 (1995) (quoting *Virginia Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 96 S.Ct. 1817, 1826 ([1976]).)

Despite the value of commercial speech, however, it is afforded lesser protection under the First Amendment than other types of speech, such as speech soliciting donations for political or charitable causes. *Central Hudson*, 447 U.S. at 562, 100 S.Ct. at 2349; *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980). Charitable solicitation of funds does more than inform private economic decisions because it involves the dissemination of views and the advocacy of political and social causes. *Village of Schaumburg*, 444 U.S. at 632, 100

S.Ct. at 834. It is, therefore, protected more highly than commercial speech. Commercial speech also receives lesser protection because, to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the First Amendment's guarantee with respect to the latter kind of speech. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 2375, 132 L.Ed.2d 541 (1995).

The protection afforded commercial speech under the First Amendment depends upon the nature of the speech and the government interests served by its regulation. *Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. The First Amendment does not protect commercial speech that is untruthful or concerns unlawful activity. *Id.; Florida Bar*, 515 U.S. at 623, 115 S.Ct. at 2375. Commercial speech that falls into neither of those categories may be regulated, however, if: (1) the government asserts a substantial interest in support of the regulation; (2) the government demonstrates that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly tailored. *Central Hudson*, 447 U.S. at 564–565, 100 S.Ct. at 2351; *Florida Bar*, 515 U.S. at 624, 115 S.Ct. at 2376. The court applies intermediate scrutiny—somewhere between the "least–restrictive means" test used in some cases involving freedom of the press and the "rational basis" test used in fourteenth amendment equal protection analysis—in making the determination whether a regulation of commercial speech offends the First Amendment. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2351; *Florida Bar*, 515 U.S. at 623, 115 S.Ct. at 2375.

A. Do the Amended Rules Amount to Governmental Restriction on Lawful Commercial Speech

Before applying the three prong test enumerated in *Central Hudson*, the court must determine whether the FTC's do–not–

call registry and fee Rules qualify as a type of regulation implicating the First Amendment. Specifically, the regulations must amount to a government restriction on lawful and truthful commercial speech. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2351. The amended Rules amount to a government restriction on lawful and truthful commercial speech for several reasons.

First, the do–not–call registry affects lawful and truthful commercial speech that is protected under *Central Hudson*. The do–not–call registry and its fees apply to all "outbound telephone calls to induce the purchase of goods and services." 16 C.F.R. § 310.4(b)(1)(iii)(B). "Solicitations to induce charitable contributions" are not covered by the registry, and "charitable contributions" are defined as "any donation or gift of money or any other thing of value." *Id.* §§ 310.2(f), 310.6(a). Since the registry and its fees only apply to speech intended to induce the purchase of goods and services, the regulations only apply to speech proposing a financial transaction, or commercial speech, as it is defined under the First Amendment. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2351. Additionally, the regulations refer to all commercial speech without regard to truthfulness or lawfulness and, therefore, concern lawful commercial speech which is protected by the First Amendment. *Id.; Florida Bar*, 515 U.S. at 623, 115 S.Ct. at 2375.

A more troubling question is whether the regulations are a "government restriction" on speech that even implicates the First Amendment. The amended Rules do not restrict speech by explicitly and directly limiting it. Instead of placing an outright ban on commercial telemarketing calls, the FTC has merely provided a mechanism by which the individual can choose to ban all commercial telemarketing calls to his residence. The Supreme Court addressed the constitutionality

of a similar regulation in *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).[2]

In *Rowan*, the Court upheld a statute which allowed an addressee to refuse mail from any sender by notifying the local postmaster, who then instructed the sender to remove the addressee's name and address from its mailing list under penalty of law. *Rowan*, 397 U.S. at 738, 90 S.Ct. at 1491. The court found that the statute did not violate the First Amendment because the purpose of the statute was to eliminate governmental involvement in any determination concerning the content of the materials and to allow the addressee complete and unfettered discretion in electing what speech he desired to receive. *Id.* at 738, 90 S.Ct. at 1491 The First Amendment right to speak was only circumscribed by an affirmative act--the addressee's giving notice that he no longer wished to receive mail from the sender. *Id.* at 737, 90 S.Ct. at 1490. The court categorically rejected the argument that a vendor has the right to send unwanted material into the home of another and found that the statute did not operate as a government restriction on speech. *Id.* at 738, 90 S.Ct. at 1491. Accordingly, the statute in *Rowan* was upheld as constitutional. *Id.*

Relying on *Rowan*, the FTC argues that any burden imposed on commercial speech by the do–not–call registry is imposed by the actions of individual consumers rather than the government. (Defs.' Br. at 18–19.) According to the FTC, the do–not–call registry, like the statute in *Rowan*, does not implicate First Amendment concerns because the government

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[2] In *Rowan*, the Supreme Court did not address the applicability of the *Central Hudson* test to the statute in question. Instead, the court held at the outset that the government was not sufficiently involved in restricting speech to implicate First Amendment concerns. *Rowan*, 397 U.S. at 738, 90 S.Ct. at 1491. Because *Rowan* did not apply the *Central Hudson* test, the court in this opinion will address the questions raised by *Rowan* prior to analysis under Central Hudson.

is not sufficiently involved in determining what speech an individual does and does not hear. Plaintiffs argue that the registry system favors one kind of speech over another and manipulates consumer choice, unlike the statute in *Rowan*, making it a government restriction implicating the First Amendment. (Pls.' Br. at 27–29.)

The court rejects the FTC's position and holds that the do–not–call registry sufficiently involves the government in the regulation of commercial speech to implicate the First Amendment and require the application of the *Central Hudson* test. An important distinction between *Rowan* and this case is that, in *Rowan*, the individual had complete autonomy to prevent any chosen material from entering his home. The government's regulation had no bearing on this choice. *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484. In fact, the Supreme Court specifically stated:

> Both the absoluteness of the citizen's right under [the statute] and its finality are essential . . . . In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents . . . . Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions . . . .

Rowan, 397 U.S. at 737, 90 S.Ct. at 1491

Here, however, the FTC, by exempting charitable solicitors from the amended Rules' do–not–call registry, has imposed a content–based limitation on what the consumer may ban from his home. Although the consumer does retain the choice whether to sign up for the registry, the government has removed the absoluteness of that autonomy by itself exempting certain types of speech from the restrictions of the registry. Any consumer who desires to refuse all telemarketing calls, commercial and noncommercial, cannot enforce that preference. Although these consumers may refuse calls for charitable contributions through the company–specific

list, telemarketing calls soliciting charitable contributions will ring through to the consumer, while commercial calls will not. The mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice, thereby entangling the government in deciding what speech consumers should hear. This entanglement creates a regulatory burden on commercial speech.

Furthermore, the fact that the do–not–call registry is not an outright government ban on commercial speech does not mean that it is not a burden implicating the First Amendment. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000). "The distinction between laws burdening and laws banning speech is but a matter of degree. The government's content–based burdens must satisfy the same rigorous scrutiny as its content–based bans." *Id.* Based on the holdings in *Rowan* and *Playboy Entertainment Group*, the court determines that the do–not–call registry is a significant enough governmental intrusion and burden on commercial speech to amount to a government restriction implicating the First Amendment. The test enumerated in *Central Hudson* must, therefore, be applied in determining the constitutionality of the FTC's amended Rules.

B. Are the Amended Rules Justified by a Substantial Government Interest?

Under the *Central Hudson* test, the party seeking to uphold a restriction on commercial speech carries the burden of justifying it with a substantial interest. *Edenfield*, 507 U.S. at 770, 113 S.Ct. at 1800. The government body seeking to sustain a restriction on speech cannot satisfy this burden with speculation or conjecture but must demonstrate that the harm is real. *Id.* at 770–771, 113 S.Ct. at 1800. Unlike other standards of constitutional review, intermediate scrutiny requires the court to examine only the government interest set forth by the government; the court cannot consider other

possible interests in determining the regulation's constitutionality. *Id.* at 768, 113 S.Ct. at 1798. Here, the FTC asserts that it has an interest in protecting the privacy of those who indicate they do not wish to receive telephone calls from telemarketers in their homes. (Defs.' Br. at 23.) Additionally, the FTC claims that it has a substantial interest in curbing deceptive and abusive telemarketing practices. (Defs.' Br. at 29.)

The government's interest in protecting the well–being, tranquility, and privacy of the home is of the highest order in a free and civilized society. *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988) (citing *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 2296 [(1980)].) Accordingly, the Supreme Court has recognized that "[p]reserving the sanctity of the home, the one retreat where men and women can repair to escape from the tribulations of their daily pursuits, is an important value." *Id.* Although in public locations it is the responsibility of the individual to avoid speech that he does not wish to hear, in the home a man is entitled to close off the rest of the world. *Id.* The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality; therefore, a citizen may erect a wall around his residence that no person may penetrate without his acquiescence. *Rowan*, 397 U.S. at 737–738, 90 S.Ct. at 1491. It is this "right to be let alone" that Justice Brandeis characterized as "the most comprehensive of rights and the right most valued by civilized men." *Hill v. Colo.*, 530 U.S. 703, 717, 120 S.Ct. 2480, 2489–2490, 147 L.Ed.2d 597 (2000) (citing *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564 [(1928)] [Brandeis, J., dissenting].)

One aspect of residential privacy is the right to avoid unwanted communications. *Id.; Hill*, 530 U.S. at 716, 120 S.Ct. at 2489. Thus, the Supreme Court has repeatedly held that individuals are not required to welcome unwanted speech into their homes and that the government may protect this

freedom. *Frisby,* 487 U.S. at 485, 108 S.Ct. at 2502. The FTC's asserted interest in protecting privacy in the home is sufficiently substantial to justify a restriction in speech if the restriction fulfills the other requirements of *Central Hudson.* The Supreme Court has recognized the validity of this interest. *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484.

The FTC's asserted interest in protecting consumers from deceptive and abusive telemarketing practices is also a substantial government interest under *Central Hudson.* There is a substantial state interest in preventing deception and mistreatment of consumers. *Friedman v. Rogers*, 440 U.S. 1, 16, 99 S.Ct. 887, 897, 59 L.Ed.2d 100 (1979). Accordingly, the interest in preventing abusive telemarketing practices is sufficiently substantial to justify a restriction on commercial speech if the restriction fulfills the other requirements of *Central Hudson.*

C. Do the Amended Rules Materially Advance the Substantial Interest Articulated by the FTC?

The FTC must demonstrate that the restriction on speech will advance, to a material degree, the government's interest in protecting privacy. *Edenfield*, 507 U.S. at 770–771, 113 S.Ct. at 1792. The regulation may not be sustained if it provides only remote support for the government's purpose. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2343. This requirement is critical; otherwise, a state could restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. *Rubin*, 514 U.S. at 487, 115 S.Ct. at 1590 (citing *Edenfield*, 507 U.S. at 771, 113 S.Ct. at 1792).

At the outset, it is important to note the parties' agreement that all telemarketing calls are invasive of privacy, whether made for commercial or charitable solicitations. (Defs.' Br. at 25.) The FTC argues that the regulations creating the do–not–call registry materially advance the government's interest in

protecting individuals from telemarketing calls they do not wish to receive, despite its limited application to only some types of commercial solicitations. (Defs.' Br. at 25–31.) According to the FTC, because there is an interest in reducing the number of unwanted telemarketing calls, every call prevented by the do–not–call registry furthers the government's interest in protecting privacy, regardless of the fact that other unwanted calls are not prevented. (*Id.* at 25.) If plaintiffs' estimates are credited, one may assume that the FTC's do–not–call registry might eliminate anywhere from forty to sixty percent of all telemarketing calls for those who subscribe, a substantial amount of unwanted calls. (Pls.' Br. at 10; Pls.' Reply at 27.) Plaintiffs counter that the registry is fatally under–inclusive because it only affects unwanted commercial calls, even though telemarketing calls seeking charitable contributions are equally unwanted and invasive of privacy. (Pls.' Br. at 38–41.) The Supreme Court dealt with similar arguments in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

In *Discovery Network*, Cincinnati prohibited news racks containing commercial handbills in order to further an asserted interest in city beautification. The city did not, however, prohibit news racks containing newspapers, which included both commercial speech and political speech. *Discovery Network*, 507 U.S. at 417, 113 S.Ct. at 1510. Noting that news racks containing commercial handbills only comprised 62 out of 2000 news racks in the city, approximately three percent (3%), the Court found that the regulation did not materially advance the city's interest in beautification. *Id.* Additionally, the court rejected the argument made by the FTC here: that *any* reduction in the number of news racks, no matter how small, furthered the city's purpose. *Id.*

The FTC has gone much farther in advancing its interest than the city did in *Discovery Network*. The assumed forty to

sixty percent reduction in unwanted telemarketing calls significantly limits invasions of individual privacy, when that percentage is compared to the paltry three percent reduction in news racks achieved by the city in *Discovery Network*. Were the under–inclusive scope of the registry the only issue relevant to whether the registry "materially advances" the FTC's interest, this court would hold that the amended Rules pass this part of the *Central Hudson* test. Unfortunately for the FTC, however, *Discovery Network*, and other first amendment cases, indicate that numerical under–inclusiveness *per se* is not the fatal defect that renders a government restriction on speech unconstitutional under the second prong of the *Central Hudson* analysis. Rather, the First Amendment imposes, not an "under–inclusiveness' limitation," but a "content discrimination" limitation. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 2545, 120 L.Ed.2d 305 (1992).[3]

The Supreme Court has held that, to materially advance the government's interest, the government is not required to make progress on every front before it can make progress on any front. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434, 113 S.Ct. 2696, 2707, 125 L.Ed.2d 345 (1993). If the government avoids regulating certain fronts in attempting to materially advance its interest, however, it cannot justify its abstention on these fronts based on the content of the speech. *R.A.V.*, 505 U.S. at 387, 112 S.Ct. at 2545. "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–649, 104 S.Ct. 3262, 3267, 82 L.Ed.2d 487 (1984). In *Discovery Network*, the Supreme Court recognized content discrimi-

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[3] Although *R.A.V.* did not involve commercial speech or *Central Hudson* analysis, its explanation of the true goal of the "under–inclusiveness" limitation in first amendment jurisprudence is equally applicable to the *Central Hudson* test.

nation as the primary flaw in the city's regulation of news racks. *Discovery Network*, 507 U.S. at 417, 113 S.Ct. at 1510. The city's regulation failed under the First Amendment because the regulation distinguished between commercial and noncommercial speech, despite the fact that there was no evidence that the commercial use of news racks was more harmful to city beautification than other uses of news racks. *Discovery Network*, 507 U.S. at 418–419, 113 S.Ct. at 1511. When a regulatory regime is pierced by content–based exemptions and inconsistencies in the government's explanation as to how the regime advances a substantial interest, it must fail under the First Amendment. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190, 119 S.Ct. 1923, 1933, 144 L.Ed.2d 161 (1999). Simply stated, the government's practice cannot be at odds with the asserted government interest. *Id.* at 191, 119 S.Ct. at 1933. The regulation cannot distinguish among the indistinct, permitting a variety of speech that entails the same harm as the speech which the government has attempted to limit. *Id.* at 195, 119 S.Ct. at 1935.

Here, plaintiffs argue that the registry does not materially advance the FTC's interest because the FTC has made a content–based distinction between commercial and charitable solicitations for reasons unrelated to its interest in privacy. There is no doubt that unwanted calls seeking charitable contributions are as invasive to the privacy of someone sitting down to dinner at home as unwanted calls from commercial telemarketers. The FTC recognized this when promulgating the amended Rules. 68 Fed.Reg. at 4637. Realizing that its interest in privacy does not justify the distinction between commercial and noncommercial speech, the FTC attempts to justify the distinction by advancing several other arguments.

First, the FTC argues that nonprofit corporations and political fund–raisers are less likely than for–profit entities to engage in abusive practices because the consumer is both a

potential donor *and* a potential voter or volunteer for the charity or political party. (Defs.' Br. at 29.) Distinguishing between commercial and noncommercial speech may be proper when it bears a relationship to preventing commercial harms, such as fraud. *See Discovery Network*, 507 U.S. at 426, 113 S.Ct. at 1515.

This argument fails because there is no evidence in the administrative record or before this court that abusive and fraudulent telemarketing practices are more often instigated by commercial telemarketers than by charitable telemarketers. The importance of repeat business provides a commercial telemarketer with an incentive to act in a responsible and decorous manner which is as strong as the incentive possessed by a charitable telemarketer. *See Edenfield*, 507 U.S. at 776, 113 S.Ct. at 1803. Conversely, just because a corporation has made the necessary filings to achieve nonprofit or charitable status does not mean that its fund raising methods are beyond reproach. Many a mountebank has utilized the corporate form, including nonprofit incorporation, to perpetrate fraud on unsuspecting consumers. In any type of transaction where money changes hands, whether charitable or commercial, fraudulent deeds will find a foothold and pose a risk to the public. The FTC's attempt to justify its distinction between commercial and charitable solicitations on this basis, therefore, fails. Distinguishing between commercial and charitable solicitations in the telemarketing context does not materially advance the FTC's interest in curbing abusive or fraudulent telemarketing practices.

In the administrative record, the FTC indicates that it exempted charitable organizations from the do–not–call list because of the heightened First Amendment protection due charitable speech. 68 Fed.Reg. at 4586. This reasons fail under the First Amendment as a matter of law. Any attempt to distinguish between commercial and noncommercial speech

solely because of commercial speech's lesser protected status under the Constitution "attach[es] more importance to the distinction between commercial and noncommercial speech than cases warrant and seriously underestimates the value of commercial speech." *Discovery Network*, 507 U.S. at 419, 113 S.Ct. at 1511 A content–based distinction cannot be made on constitutional grounds unrelated to the asserted government interest.

Finally, the FTC argues that the amended Rules do not create a distinction between commercial and charitable speech based on content, but based on secondary effects, which is permissible. (Defs.' Br. at 20–21.) According to the FTC, the secondary effects of the calls are the constant ringing of unwanted telemarketing calls. (*Id.*) A regulation is not considered content–based if the justification for distinguishing between content is not related to the content itself, but to the secondary effects of the content. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986). Even if invasion of privacy is regarded as a secondary effect, it does not justify treating commercial speech differently from noncommercial speech, since the secondary effect is the same for both types of speech.[4]

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[4] In the administrative record, the FTC states, "as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions." 68 Fed.Reg. at 4586. This statement suggests that the FTC chose to exclude non–profit corporations from the registry based on favoritism of nonprofit corporations and their missions over the objectives of for–profit corporations. Such favoritism is not a valid reason for content–based regulation. The government may not regulate speech based on hostility or favoritism towards the underlying message expressed. *R.A.V.*, 505 U.S. at 386, 112 S.Ct. at 2545. Furthermore, because the FTC did not assert this as its government interest, such favoritism cannot justify the content–based distinction in this case.

Based on the forgoing, the court finds that the FTC's do–not–call registry does not materially advance its interest in protecting privacy or curbing abusive telemarketing practices. The registry creates a burden on one type of speech based solely on its content, without a logical, coherent privacy–based or prevention–of–abuse–based reason supporting the disparate treatment of different categories of speech. *See Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir.1998). Were the do–not–call registry to apply without regard to the content of the speech, or to leave autonomy in the hands of the individual, as in *Rowan*, it might be a different matter. As the amended Rules are currently formulated, however, the FTC has chosen to entangle itself too much in the consumer's decision by manipulating consumer choice and favoring speech by charitable over commercial speech. The First Amendment prohibits the government from enacting laws creating a preference for certain types of speech based on content, without asserting a valid interest, premised on content, to justify its discrimination. Because the do–not–call registry distinguishes between the indistinct, it is unconstitutional under the First Amendment. Having held that the amended Rules fail the second part of the *Central Hudson* test, the court chooses not to address the final part of the test or to determine the now–moot issue of whether the FTC may charge a fee for obtaining the do–not–call registry.

3. Statutory Authority Under the Telemarketing Act

Plaintiffs challenge the FTC's interpretation of the Telemarketing Act and argue that the FTC does not have statutory authority to promulgate rules concerning a do–not–call registry and abandoned calls. Because the court has already addressed the amended Rules concerning the do–not–call registry and held they cannot withstand constitutional scrutiny, it need only review the amended Rules concerning abandoned calls to determine whether the FTC had authority to promulgate them.

When a court reviews an agency's construction of a statute which it administers, the court must examine two questions. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). First, the court should examine whether Congress has, in the statute, addressed the precise question at issue in the agency's interpretation. *Id.* If the intent of Congress is clear, then the court and the agency must give effect to this intent. *Id.* at 842–843, 104 S.Ct. at 2781 If, however, Congress has not directly addressed the precise question at issue, the question for the court is whether the agency's interpretation of the statute is based on a permissible construction of the statute, *Id.* at 843, 104 S.Ct. at 2781–2782. If Congress, by failing to directly address an issue, has left a gap for the agency to fill, the agency's regulations filling this gap are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843–844, 104 S.Ct. at 2782. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Id.* at 844, 104 S.Ct. at 2782.

First, plaintiffs argue that the FTC's regulations regarding abandoned calls regulate the use of predictive dialers, by prohibiting abandoned calls unless telemarketers utilize "technology that ensures abandonment of no more that three percent (3%) of all calls." (Pls.' Br. at 51 [citing 16 C.F.R. § 310.4(b)(4)(i)].) Predictive dialers are machines employed in telemarketing, which use algorithms to determine the number of calls to prospective customers which may be dialed simultaneously in order to ensure that when a sales agent is finished with one call he may transfer immediately to a new call dialed by the predictive dialer. (Pls.' Br. at 49.) Using a predictive dialer allows a telemarketer's sales agents to remain on the phone perpetually without any dialing or other down time, and provides an extremely cost–effective way of doing business. (*Id.*) The use of predictive dialers, however, often results in calls being "abandoned," when

a sales agent is not available to transfer to the new call and the customer answering the telephone hears "dead air." (*Id.* at 49–50.)

Plaintiffs argue that regulation of predictive dialers, defined as "customer premises equipment" under the Communications Act, is within the sole jurisdiction of the FCC. (*Id.*) According to plaintiffs, therefore, the FTC does not have the jurisdictional authority to adopt regulations concerning abandoned calls, which affect predictive dialers. (*Id.*) The Communications Act defines "customer premises equipment" as equipment "employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications 47 U.S.C.A. § 153(14) (West 2001 & Supp.2003)." Predictive dialers qualify as "customer premises equipment" because they are employed on the premises of telemarketers to originate, route, and terminate telephone calls to potential customers. Regulation of predictive dialers, therefore, is within the jurisdiction of the FCC. The fact that the FCC has jurisdiction to regulate in an area, however, does not necessarily mean that the FTC lacks jurisdiction to regulate in the same area.

We live in an "era of overlapping agency jurisdiction under different statutory mandates." *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C.Cir.1977). Here, Congress has given both the FTC and the FCC the authority to adopt regulations effecting the telemarketing industry. 15 U.S.C.A. §§ 6101–6108; 47 U.S.C.A. § 227. Specifically, Congress gave the FTC the authority under the Telemarketing Act to promulgate rules prohibiting "deceptive or abusive telemarketing practices." 15 U.S.C.A. § 6102. Congress required the FTC to define "deceptive or abusive telemarketing acts or practices." *Id.* In the amended Rules, the FTC defines abandoning calls as an abusive act or practice and requires telemarketers to either have a sales agent available to take the call or play a message with the seller's name and telephone number. 16 C.F.R.

§ 310.4(b)(1)(iv), (b)(4)(ii). The FTC was well within its authority to enact regulations defining "abusive and deceptive telemarketing practices," since Congress expressly granted the FTC this authority in the Telemarketing Act. *Chevron*, 467 U.S. at 842–843, 104 S.Ct. at 2781 As stated earlier, if the intent of Congress is clear in the statute, then the court and the agency must give effect to this intent. *Id.*

Plaintiffs argue that, although the FTC has express Congressional authority to define "abusive and deceptive telemarketing practices," the FTC does not have the authority to define the practice of abandoning calls as one of these practices because the FCC has exclusive jurisdiction over predictive dialers. (Pls.' Br. at 51–55.) Basically, according to plaintiffs, the FTC abused its discretion in concluding that the Telemarketing Act permits the FTC to define the practice of abandoning calls as an abusive and deceptive practice. Plaintiffs cite no cases showing that the FCC has exclusive jurisdiction over the regulation of abandoned calls or predictive dialers in light of the Telemarketing Act The cases cited by plaintiffs are inapposite because they address (1) the jurisdiction of the FCC vis–a–vis the states, over interstate telecommunications and (2) the notion that the FCC regulatory scheme does not provide a basis for implied exemption from antitrust laws. *Essential Communications Sys., Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1116 (3d Cir.1979); *Macom Prods. Corp. v. Am. Tel. & Tel. Co.*, 359 F.Supp. 973, 977 (C.D.Cal.1973). Plaintiffs' arguments do not address a situation where Congress has directly granted authority to one federal agency in an area where another federal agency already has jurisdiction, as is the case here. Based on independent research, the court finds no basis to conclude that the FCC has exclusive jurisdiction to regulate the practice of abandoning calls. Because Congress has not directly addressed whether the FTC can regulate abandoned calls, the question is whether the FTC's interpretation of the Telemarketing Act is a permissible construction of the statute.

Chevron, 467 U.S. at 843, 104 S.Ct. at 2781–2782. The FTC's regulations are to be given controlling weight because they are not arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843–844, 104 S.Ct. at 2782. The court, therefore, holds that the amended Rules concerning abandoned calls rest on a valid interpretation of the Telemarket ing Act.

Plaintiffs seem to claim that even if the FTC could define the practice of abandoning calls as abusive and proscribe such practice under its Rules, it still could not require predictive dialers to operate at ninety–seven percent efficiency, as such regulation of technology is the FCC's domain. This argument does not bear analysis. Because the FTC has the statutory to define abusive telemarketing practices and prohibit them, the FTC has the authority under the Telemarketing Act to prohibit all abandoned calls, and, therefore, all use of predictive dialers. Instead, in order to avoid forcing the elimination of predictive dialers altogether, the FTC allowed that telemarketers could abandon up to three percent of all calls, enabling them to continue using predictive dialers. The FTC's statutory authority to do the greater certainly encompasses its authority to do the lesser. Plainly, the FTC has effectively defined abusive telemarketing as abandoning more than three percent of calls. Because the Telemarketing Act specifically grants the FTC the authority to define abusive telemarketing practices, the amended Rules pertaining to abandoned calls are within the statutory authority of the FTC under *Chevron*.

Plaintiffs argue that the FTC abused its discretion because the amended Rules concerning abandoned calls conflict with the TCPA and FCC rules. (Pls.' Br. at 55–59.) The FTC's amended Rules allow telemarketers to avoid liability for abandoning calls by playing a pre–recorded message with the seller's name and telephone number. 16 C.F.R. § 310.4(b)(4)(iii). The TCPA makes it "unlawful for any person. to

initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message" except for those calls "made for commercial purposes that the FCC determines. . will not adversely effect privacy rights . . . and do not include the transmission of any unsolicited advertisement." 47 U.S.C.A. § 227(b)(1)(B), (b)(2)(B)(ii)(I)–(II). FCC rules except from application of the TCPA's prohibition those calls made for a commercial purpose that do not include unsolicited advertisements. 47 C.F.R. § 64.1200(c).

Based on a plain reading of these provisions, under the deferential review of *Chevron*, the FTC's amended Rules do not conflict with the TCPA or the FCC's rules. A pre–recorded statement of the seller's name and phone number is made under the FTC's amended Rules as a means of identification, to prevent residents from fearing the call was made by a would–be burglar or assailant. In that sense, the pre–recorded identification message falls under the FCC's rule excepting commercial calls that do not contain any unsolicited advertisement. 47 C.F.R. § 64.1200(c). The court sees no conflict among the statute, the FCC's rules, and the FTC's rules. Accordingly, the FTC's amended Rules pertaining to abandoned calls are valid and enforceable under the Telemarketing Act.

4. Conclusion

Based on the foregoing findings and conclusions, it is ORDERED as follows:

Plaintiffs' consent motion to amend the complaint (# 34) is GRANTED.

2. Plaintiffs' motion for summary judgment (# 24) is GRANTED in part and DENIED in part. It is GRANTED as to plaintiffs' claim that the FTC's amended Rules creating a do–not–call registry are

unconstitutional under the First Amendment. It is DENIED in all other respects.

3. Defendants' motion for summary judgment (# 28) is GRANTED in part and DENIED in part. It is GRANTED as to plaintiffs' claim that the amended Rules concerning abandoned calls are invalid under *Chevron*. It is DENIED in all other respects.

4. The clerk shall enter judgment in favor of plaintiffs and against the FTC (1) enjoining the FTC from enforcing the amended Rules (issued in December 2002) creating and implementing a federal do–not–call registry and (2) dismissing with prejudice all of plaintiffs' remaining claims.

APPENDIX F

[SEAL] FEDERAL TRADE COMMISSION
RULES and REGULATIONS

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16 CFR Part 310 Telemarketing Sales Rule;
Final Rule

Thursday, July 31, 2003

FEDERAL TRADE COMMISSION

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16 CFR Part 310

Telemarketing Sales Rule Fees
AGENCY: Federal Trade Commission.
ACTION: Final rule.

SUMMARY: The Federal Trade Commission (the "Commission" or "FTC") is issuing this Final Rule to amend the FTC's Telemarketing Sales Rule ("TSR") by adding a new Section 310.8 that would impose fees on entities accessing the National Do Not Call Registry.

EFFECTIVE DATE: Section 310.8 ("the Final Fee Rule") will become effective September 1, 2003, the first day that entities engaged in telemarketing will be able to access the National Do Not Call Registry.

ADDRESSES: Requests for copies of this Final Fee Rule should be sent to: Public Reference Branch, Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The complete record of this

proceeding is also available at that address, and on the Internet at: http:// www.ftc.gov/bcp/rulemaking/tsr/tsrrulemakingindex.htm.

FOR FURTHER INFORMATION CONTACT: David M. Torok, (202) 326-3075, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

On January 30, 2002, the FTC published a Notice of Proposed Rulemaking to amend the FTC's TSR and to request public comment on the proposed changes. 67 FR 4492 (Jan. 30, 2002) ("the Rule NPRM"). Among other provisions, the Rule NPRM proposed to establish a National Do Not Call Registry, to be maintained by the FTC, that would permit consumers who prefer not to receive telemarketing calls to register on one centralized list. On May 29, 2002, the FTC published another Notice of Proposed Rulemaking to further amend the TSR by imposing user fees on sellers and telemarketers to access the proposed registry. 67 FR 37362 (May 29, 2002) ("the User Fee NPRM"). In drafting the User Fee NPRM, the Commission was guided by the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701, and Office of Management and Budget Circular No. A-25. The Commission received 34 comments in response to the User Fee NPRM.

The Commission issued final amendments to the TSR on December 18, 2002. 68 FR 4580 (Jan. 29, 2003). Among the changes made to the TSR, the Commission adopted the proposal to establish a National Do Not Call Registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive telemarketing calls. The Amended TSR requires telemar-

keters to refrain from calling consumers who have placed their numbers on the national registry, starting October 1, 2003, the date by which full compliance with the "do-not-call" registry provisions of the Amended TSR, 16 CFR 310.4(b)(1)(iii)(B), is required. *See* 68 FR 16238, 16245 (April 3, 2003). To comply with this requirement, telemarketers will be required to access the national registry at least once every three months to remove from their telemarketing lists the telephone numbers of those consumers who have placed their numbers on the registry. 16 CFR 310.4(b)(3)(iv). When it promulgated the Amended TSR, the Commission reserved its decision on the issues raised in the User Fee NPRM, stating that it would seek further comment in a revised Notice of Proposed Rulemaking. *See* 68 FR 4580, 4640 n. 716.

On February 20, 2003, the President signed into law the Consolidated Appropriations Resolution of 2003, Pub. L. 108-7 (2003) ("the Appropriations Act"), which appropriated funds for the operation of the FTC during fiscal year 2003. In the Appropriations Act, Congress also authorized the agency to collect fees sufficient to implement and enforce the "do-not-call" provisions of the Amended TSR. Congress further estimated the costs for fiscal year 2003 at $18,100,000. *Id.* at Division B, Title II. *See* also The Do-Not-Call Implementation Act, Pub. L. 108-10 (2003) ("the Implementation Act") at sec. 2. Pursuant to the Appropriations Act and the Implementation Act, as well as the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-08 ("the Telemarketing Act"), the FTC issued a Revised Fee Notice of Proposed Rulemaking ("the Revised Fee NPRM"). 68 FR 16238 (April 3, 2003). The Commission received 35 comments in response to the Revised Fee NPRM.[1]

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[1] A list of the commenters in this proceeding, and the acronyms used to identify each, is attached hereto as Appendix A. Comments submitted in response to the Revised Fee NPRM will be cited in this Notice as

On July 3, 2003, the Federal Communication Commission ("FCC") issued its Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("the FCC Rules").[2] Among numerous other provisions, the FCC Rules prohibit any "person or entity" from "initiating any telephone solicitation" to a "residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."[3]

Based on its review of the record in this proceeding, and on its law enforcement experience in this area, the Commission hereby promulgates this Final Rule establishing fees for entities accessing the National Do Not Call Registry.

II. Constitutionality

Some commenters, principally ATA and DMA, contended that both the National Do Not Call Registry and its associated fees would violate telemarketers' First Amendment rights.[4] The Commission was mindful of the First Amendment implications of the national registry while amending the

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"[Acronym of Commenter]-Revised Fee at [page number]." Comments submitted in response to the User Fee NPRM will be cited as "[Acronym of Commenter]-User Fee at [page number]."

[2] The FCC Rules may be found at: http://hraunfoss.fcc.gov/edocs—public /attachmatch/FCC-03-153A1.pdf.

[3] 47 CFR 64.1200(c)(2), amended July 3, 2003.

[4] *See* ATA-Revised Fee at 1-16; DMA-Revised Fee at 6-7. *See* also ICL-Revised Fee at 5-6 (asserting simply "Given that the nondeceptive and nonmisleading telemarketing activity is protected commercial speech, the decision to charge some persons, corporate or individual, more than others with no relation to furtherance of residential privacy is unconstitutional."); DB-Revised Fee; JJ-Revised Fee; BP-Revised Fee; GS- Revised Fee; JS-Revised Fee; & SS-Revised Fee at 1-2 (individuals voicing concerns about freedom of speech).

TSR,[5] and throughout this rulemaking has carefully considered the constitutionality of the proposed Fee Rule.[6]

Relying primarily on case law addressing speech entitled to full First Amendment protection, ATA contended the Registry's fees are unconstitutional in part because by "making purchase of the list a precondition for engaging in telemarketing, the Commission has structured the list as a prior restraint on protected speech."[7] The Commission disagrees and believes that the registry fee provision is constitutional. To the extent the fee imposes a restraint on speech, it restrains only commercial speech. The Supreme Court has "observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it." *See Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 571 n.13 (1980) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976)). Moreover, the Final Fee Rule ensures that the fee is collected from the telemarketing industry through procedures that safeguard against unbridled discretion in the hands of a government official or agency.[8]

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[5] *See*, e.g., 68 FR 4580, 4634-37 (January 29, 2003).

[6] To the extent that ATA and DMA challenge the constitutionality of the National Do Not Call Registry itself, and not the fee proposal, the rulemaking on the registry is closed and the parties are briefing the matter for the courts to decide.

[7] ATA-Revised Fee at 3-6. *See* also DMA-Revised Fee at 6 n.11 (contending "the Court took a dim [view of permits to engage in constitutionally protected speech whose issuance depended on the payment of a license tax because it acted as a prior restraint on speech").

[8] ATA and DMA also challenge the fee size and structure. *See,* e.g., ATA- Revised Fee at 10 (categorizing the registry's fee structure as "irrationally differentiated"); DMA-Revised Fee at 1. Because Congress's guidance on the amount of the fees to be collected and the Commission's efforts to tailor the fee structure are best understood in context, these First Amendment concerns will be addressed throughout the remaining sections of this Statement.

The registry fees are more akin to the registration fees or business licenses that are commonly imposed upon businesses before they can engage in commercial speech. A regulatory fee on speech is constitutionally permissible when it is related sufficiently to the costs of administering and enforcing that regulation.[9]

III. Access to the National Do Not Call Registry

A. Entities That Are Allowed Access

In Section 310.8(e) of the Revised Fee NPRM, the Commission proposed to allow access to the national registry by telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons.[10] The Commission stated that such access to the National Do Not Call Registry may be necessary to effectuate more fully the purpose of the "do-not-call" regulations; namely, to enable consumers to stop unwanted telemarketing calls. Such access would allow those entities that are exempt from the FTC's jurisdiction, but that want to scrub their calling lists as a matter of customer service, to obtain the information

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[9] *See*, e.g., *Coalition for Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1324 n.16 (11th Cir. 2000); *National Awareness Foundation v. Abrams*, 50 F.3d 1159, 1164-1168 (2d Cir. 1995).

[10] Proposed Section 310.8(e) also permitted access to the national registry by any government agency that has the authority to enforce a federal or state "do-not-call" statute or regulation. Such agencies will access information in the national registry through Consumer Sentinel, a dedicated, secure website available only to law enforcement agencies. The Commission is expanding this provision of the Final Fee Rule to allow access to the national registry to any "government agency that has law enforcement authority." This revised language more effectively mirrors the list of law enforcement agencies that currently have access to Consumer Sentinel, and that therefore will have access to the national registry data.

necessary to do so. It also would allow sellers to obtain access, as well as other entities that have traditionally provided service to the telemarketing industry. The Commission further stated that the information in the national registry should be used for no other purpose than to stop unwanted telemarketing calls. Thus, the Commission proposed that, prior to gaining access to the national registry, a person would be required to certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

A number of commenters supported the Commission's proposal to allow for such broad access to the national registry.[11] Others suggested that nonprofit organizations soliciting donations also should be allowed to access the national registry. For example, DMA noted that such access would "effectuate the purposes of the do-not-call regulations" by allowing such entities to voluntarily scrub their calling lists.[12] The Commission agrees that nonprofit organizations that wish to obtain access to the national registry to prevent calling consumers whose telephone numbers are on the registry, even though they are not required by rule to do so, should be allowed the opportunity. As a result, the Commission is amending Section 310.8(e) by eliminating the phrase "commercial purposes" from this provision, and instead allowing access to the national registry to entities "engaged in or causing others to engage in telephone calls to consumers." As previously stated, each entity will be required to certify, under penalty of law, that it is accessing the

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[11] *See* ARDA-Revised Fee at 2; BOA-Revised Fee at 1; Household-Revised Fee at 2; NCL-Revised Fee at 1 ("Entities that are exempt from the FTC's jurisdiction should not be prevented from voluntarily accessing the registry to avoid calling consumers who do not wish to receive telemarketing solicitations.").

[12] FN12 DMA-Revised Fee at 15-16. *See* also NCL-Revised Fee at 1.

registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

B. Entities Required To Pay the Fee

The Revised Fee NPRM proposed requiring each seller to pay, on an annual basis, the appropriate fee for accessing the National Do Not Call Registry prior to initiating, or causing a telemarketer to initiate, an outbound telephone call. After paying the appropriate fee each annual period, the seller would be provided with a unique account number that it could use to gain direct access to the national registry at any time during its annual period.[13] In addition, the seller could provide its account number to any telemarketer or service provider with which it does business. That unique account number would permit the telemarketer or service provider to gain access to the information to which the seller has subscribed. The Commission noted that under this revised fee structure, each seller would be charged only one time annually for access to the information included in the national registry, and would be allowed to transfer its ability to access the national registry to whatever telemarketers or service providers it wished to employ on its behalf.

A number of commenters noted that the proposed rule would require certain sellers to pay for access to the national registry, even if they do not have to gain such access under the Amended TSR.[14] Specifically, under the Amended TSR, a

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[13] As set forth in Section 310.8(d) of the Revised Fee NPRM and the Final Fee Rule, the "annual period" is defined as the twelve months following the first day of the month in which the person paid the fee. For example, a seller who pays its annual fee on September 15, 2003, has an "annual period" that runs from September 1, 2003 through August 31, 2004.

[14] *See* ABA-Revised Fee at 1; ATA-Revised Fee at 5-6; VISA-Revised Fee at 1- 2.

seller that calls only persons with whom the seller has an established business relationship, or from whom the seller has obtained the express written agreement to call, is not required to access the national registry prior to engaging in those calls.[15] Nonetheless, as proposed, the Revised Fee NPRM would require such sellers to pay the annual fee prior to making such calls. ATA described this aspect of the proposed fees as a "particularly invidious prior restraint" and thus a violation of the First Amendment because telemarketers are forced to "pay a fee even where they have no use for information in the registry."[16] As VISA noted, the FTC should "clarify in the final rule that if a seller is not required to access the registry pursuant to an exemption or otherwise, the seller should not be required to pay a user fee provided the seller does not access the registry for other reasons."[17]

The Commission agrees that sellers engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, and who do not otherwise want to access the national registry, should not have to pay an annual fee. As a result, the Commission is amending Section 310.8(a) to make clear that sellers do not have to pay for access to the National Do Not Call Registry if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to the exemptions set forth in Amended TSR §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose. A similar change is being made to Section 310.8(b), regarding telemarketer access to the national registry.

Some commenters requested clarification that sellers exempt from the Amended TSR are not required to access the

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[15] *See* 16 CFR 310.4(b)(1)(iii)(B)(i) and (ii).

[16] ATA-Revised Fee at 5-6.

[17] VISA-Revised Fee at 1-2.

National Do Not Call Registry and pay the annual fee.[18] With the adoption of the FCC Rules, the list of sellers exempt from the requirements of the National Do Not Call Registry under federal law is considerably narrowed. Any such exempt seller, however, is not required to access the national registry or pay the annual fee. For example, solicitations to induce charitable contributions via outbound telephone calls are not covered by the National Do Not Call Registry requirements of the TSR.[19] As a result, sellers involved only in such solicitations would not be required to pay a fee or access the national registry. In addition, entities engaged solely in conducting surveys are not seeking to induce the purchase of goods or services and therefore are not engaged in "telemarketing" nor subject to the TSR.[20] Similarly, political fund raising is not "telemarketing" and is not covered.[21] Of course, any of those entities may access the national registry if they voluntarily wish to prevent calling telephone numbers that are on the registry, or if they are required by other laws or regulations to gain such access.

DMA stated that nonprofit organizations voluntarily accessing the national registry to avoid calling potential

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[18] *See* FSR-Revised Fee at 1-2; VISA-Revised Fee at 1-2.

[19] 16 CFR 310.6(a). *See* also 47 CFR 64.1200(f)(9)(iii), amended July 3, 2003 (FCC Rules defining a "telephone solicitation" as not including a call or message "by or on behalf of a tax-exempt nonprofit organization."

[20] The Amended TSR defines "telemarketing" as a "plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones, and which involves more than one interstate telephone call." 16 CFR 310.2(cc).

[21] Sellers that engage solely in intrastate telemarketing, or that engage in businesses outside of the jurisdictional limitations of the FTC, are not required by the Amended TSR to access the National Do Not Call Registry or pay for such access. However, such companies are required by the FCC Rules to access the national registry and pay for such access. *See* FCC Rules at) 27.

donors who do not want to receive telemarketing calls should not be charged for such access.[22] The Commission agrees that such charges are unwarranted. Section 310.8(c) is amended to provide that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the national registry without being required under this Rule, the FCC Rules, or any other federal law.[23] Such persons must provide all information required of other entities accessing the registry, must certify, under penalty of law, that they are accessing the registry solely to prevent telephone calls to telephone numbers on the registry, and must further certify that they are accessing the registry without being required under this Rule, the FCC Rules, or any other federal law. Affording these persons such access to the registry will enable them to abide by consumers' choices not to be called by commercial telemarketers. At the same time, the certification requirement—under penalty of law—will enable the Commission to take appropriate steps against those who misuse the registry.

The Commission also proposed in the Revised Fee NPRM that telemarketers who are not also sellers—i.e., entities that engage in telemarketing only on behalf of others—would not have to pay a separate fee for their access to the national registry. Similarly, list brokers or other service providers who develop and/or scrub the calling lists for their seller-clients would not have to pay for their individual access to the national registry. Instead, such telemarketers and service providers would be required to ensure that their seller-clients have paid for access to the National Do Not Call Registry prior to initiating outbound telephone calls, or providing services, on their behalf. Telemarketers and service providers

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[22] *See* DMA-Revised Fee at 15-16.

[23] Such persons consist solely of entities engaged in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys.

would gain this assurance by obtaining and using the seller's unique account number to access the national registry.

DMA opposed this "seller pays" model for the National Do Not Call Registry.[24] Instead, DMA suggested that the FTC "should leave the issue of who pays for the List to the contractual provisions between service bureaus and sellers."[25] IMC stated that a "more workable proposal would be to require each calling entity, third party or seller using in house callers to purchase and implement the list. Thus, IMC could purchase access to the registry once and call on behalf of all its clients."[26] The Commission does not believe such a system would equitably spread the fees for the national registry among all entities that engage in telemarketing. As the Commission explained in the Revised Fee NPRM, sellers are the ultimate beneficiaries of telemarketing campaigns, and covered sellers must gain access to the information in the national registry to remain in compliance with the "do-not-call" provisions of the Amended TSR. As a result, all such sellers should pay an appropriate fee for that access. Moreover, by charging only telemarketers for access to the national registry, and charging them only once for their access on behalf of multiple clients, IMC's proposed fee structure would inequitably benefit those sellers that employ a telemarketer with multiple clients. This inequitable advantage is created because those sellers would bear less of the cost of access to the same information than sellers that engage in their own telemarketing without hiring a telemarketer. Thus, the Commission will require sellers, and not their tele-

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[24] *See* DMA-Revised Fee at 7-8.

[25] *Id.*

[26] IMC-Revised Fee at 5.

marketers or service providers, to pay for access to the national registry.[27]

The FCC Rules recognize that allowing telemarketers and others to share the information obtained from the national registry "would threaten the financial support for maintaining the database."[28] In fact, the FCC Rules specifically prohibit any entity that accesses the national registry from "participat[ing] in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers."[29] The Commission agrees with the FCC, and believes such a prohibition is appropriate to include in the Final Fee Rule as well. As a result, the Commission is including similar prohibitory language in Section 310.8(c).[30]

The Revised Fee NPRM did not permit any entity, other than a seller, to purchase the list of numbers in the national registry. A number of commenters noted that telemarketers calling on behalf of exempt entities would be in the "untenable position" of being required to comply with the "do-not-call" provisions of the Amended TSR, but not having the ability to access the national registry without their exempt

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[27] The FCC Rules require all entities "making telephone solicitations (or on whose behalf telephone solicitations are made)" to "purchase[] access to the relevant do-not-call data from the administrator of the national database." 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003. The Commission will deem all telemarketers or service providers who are not also sellers to have "purchased access" to the national registry by providing the unique account number of the seller on whose behalf the telemarketer or service provider is gaining access.

[28] FCC Rules at) 32, n.129.

[29] 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003.

[30] Inclusion of this prohibition in the Fee Rule also will "maximize consistency" between the FTC and FCC Rules. *See* Do Not Call Implementation Act, § 3.

seller-clients having paid for access.[31] To address this potential problem, some commenters suggested allowing telemarketers direct access to the national registry.[32] Convergys, a large telemarketer commenter, described a number of other situations when telemarketers may want to subscribe to the national registry although their seller-client is not required to do so, or has already purchased the list. For example, the telemarketer may want to scrub the calling list of a client calling customers with an existing business relationship, or "to help guard against errors or omissions" in the sellers' lists and to re-verify the accuracy of those lists.[33]

For the reasons set forth in these comments, the Commission agrees that allowing independent access to the national registry by telemarketers or other service providers is appropriate. As a result, telemarketers or service providers will be allowed to gain access to the national registry on their own behalf, without being limited solely to the access allowed for their seller-clients. To maintain the fairness of the fee structure, however, telemarketers and service providers will be required to pay the appropriate fee for such independent access. Moreover, covered sellers still will be required to pay the fee prior to engaging in, or causing a telemarketer to engage in, outbound telephone calls for which access to the "do-not-call" registry is required by the Amended TSR. This "covered seller pays" requirement remains in place regardless of whether the telemarketer or service provider employed by the seller independently and voluntarily pays for access to the national registry. In addition, telemarketers and service providers paying for such independent access must certify that they are accessing the

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[31] *See* ABA-Revised Fee at 1-2; BOA-Revised Fee at 1-2; Convergys-Revised Fee at 3-5; FSR-Revised Fee at 1-2.

[32] *See* BOA-Revised Fee at 1-2; Convergys-Revised Fee at 5.

[33] *See* Convergys-Revised Fee at 2-5.

national registry solely to comply with the provisions of the Amended TSR, or otherwise to prevent telephone calls to telephone numbers on the national registry. Finally, such telemarketers or service providers are not permitted to use the information they obtain from the national registry on behalf of any entity, covered seller or exempt, unless that entity has paid the appropriate fee for access to the information or, for exempt sellers, has submitted the appropriate certification to gain access to the national registry.

C. Other Registry Access Issues

Commenters raised three other issues regarding access to the national registry. First, commenters suggested allowing sellers and telemarketers to allocate responsibility among themselves for obtaining access to the national registry. The Revised Fee NPRM anticipated that all covered sellers would initially access the national registry on their own behalf, pay the appropriate fee and acquire an account number, which they could then provide to any telemarketer or service provider that they wish to hire. Commenters noted, however, that telemarketers and service bureaus frequently access state "do-not-call" lists on behalf of their seller-clients.[34] These commenters maintained that sellers should be permitted to access the national registry either directly, or permit a third party, such as a telemarketer or list broker, to enroll and access on the seller's behalf. "In either event, a unique account number could be assigned for each seller, thereby allowing it the flexibility to change telemarketers/service providers, or use multiple telemarketers, once an access fee has been paid on its behalf."[35]

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[34] *See* ERA-Revised Fee at 3-5; MPA-Revised Fee at 4-5; West-Revised Fee at 1-2.

[35] ERA-Revised Fee at 4.

The Commission is persuaded that such flexible access is appropriate. Sellers may contract with telemarketers or other service providers to access the national registry on their behalf to satisfy the rule's requirements. In this way, sellers and their agents can allocate the responsibility for accessing the registry, although the seller remains ultimately liable for calls made on its behalf, and telemarketers remain liable for ensuring that their covered sellers have paid the appropriate fee. A unique account number still will be provided in the seller's name, for use by the seller throughout its annual period. As a result, §§ 310.8(a), (b), and (d) are amended to allow sellers to pay the annual fee "either directly or through another person."

The second issue raised by commenters regarding access to the national registry concerns the frequency of that access. Convergys stated that the fee rule should require telemarketers to access the data quarterly, regardless of the number of new clients they might acquire during that period. Telemarketers could then update their access and their registration information (with identities of new sellers) on a quarterly basis.[36] Similarly, DMA stated that it is inefficient to require a service bureau to access the registry separately in the event it signed up a new client, even though it has a current version of the telephone numbers in the registry.[37] Convergys also noted that current telemarketer systems are designed to allow telemarketers to access data directly and use it for more than one client. According to Convergys, limiting access to varying levels paid for by various clients would require significant modifications, burdens and costs.[38]

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[36] Convergys-Revised Fee at 6-8.

[37] DMA-Revised Fee at 8.

[38] Convergys-Revised Fee at 6.

The Commission never proposed requiring telemarketers or service bureaus to access the national registry or download data separately for each client. There are two requirements in effect that mandate the frequency of access to the national registry. First, § 310.4(b)(3)(iv) of the Amended TSR requires sellers and telemarketers to employ a version of the national registry obtained from the Commission no more than three months prior to the date any call is made. Second, § 310.8(a) of the revised fee rule requires sellers to pay the annual fee prior to initiating, or causing a telemarketer to initiate, outbound telephone calls to persons whose numbers are on the registry. As a result, a telemarketer need only access the national registry once every three months, assuming it can scrub all of its calling lists by using that frequency of access.[39] It can call on behalf of all of its clients during that period, scrubbing from all of its calling lists those

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[39] The Commission has developed the "do not call" rules to allow sellers and telemarketers to determine when and how frequently they need to access the national registry to remain in compliance. Unlike many state systems, the national registry is continuously updated as [consumers register. As a result, telemarketers obtain the most up-to-date list of telephone numbers each time they access the registry. This allows consumers to see a decrease in telemarketing calls from the first day they register, rather than having to wait for their numbers to be published in a quarterly list. This caused some concern for one commenter, West, that stated: "Without a defined update schedule, the potential exists for numbers to be missed in the three-month window. It takes approximately twenty to twenty-four hours to update the West system with a do-not-call registry consisting of one million records because the upload happens on a real time basis. Given this, there is the potential for a number that is added one day after West downloads the do-not-call registry to be missed in the three month window. This would require West to actually download the list more than quarterly to avoid this potential problem." West-Revised Fee at 2. It is up to the individual seller or telemarketer to determine how frequently it must access the national registry to remain in compliance with the requirement that it use a version of the registry obtained from the Commission not more than three months prior to the date any call is made.

numbers that were included in the national registry at the time the telemarketer accessed the registry. If the seller-client agrees to allow the telemarketer to use the information already in the telemarketer's files from a prior download from the national registry within the previous three months, there is no rule violation for the telemarketer to do so. In other words, telemarketers and service providers acting on behalf of sellers may use one download from the national registry on behalf of multiple clients, as long as the fee for each of the seller-clients is paid.

The third access issue raised by commenters is an objection to the requirement that telemarketers and list brokers must identify their clients when accessing the national registry. According to DMA, these "contractual relationships are proprietary information and bear no relationship to consumer privacy."[40] Convergys stated: "For any business, customer identity is inherently sensitive, proprietary data and there is no basis in the record for requiring telemarketers to disclose it routinely and in the absence of substantial complaints or other evidence to suggest there have been violations."[41] The[42] Commission understands the likely proprietary nature of these business relationships, and notes that, to the extent, if any, such information constitutes trade secrets or other confidential or privileged commercial or financial information, it would not be subject to mandatory public disclosure by the Commission. Nevertheless, this information is critical for effective law enforcement of the "do not call" registry provisions of the Amended TSR, as well as for effective collection of the required fees. Typically, consumers reporting "do-not-call" complaints will have only the name of

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[40] DMA-Revised Fee at 7-8.

[41] Convergys-Revised Fee at 5-6.

[42] *See* Freedom of Information Act Exemption 4, 5 U.S.C. 552(b)(4); FTC Act § 6(f), 15 U.S.C. 46(f).

the seller provided to the consumer during the call. As part of the investigation of such complaints, law enforcement may seek to determine whether the seller made that call on its own behalf, or used the services of a telemarketer. Information provided by sellers and telemarketers to gain access to the national registry is highly relevant to law enforcement. Querying the registry is faster, less expensive, and a potentially more reliable method of obtaining that information than traditional discovery tools, which also likely would eventually result in the disclosure of the same proprietary information. Equally important, to ensure that all sellers pay their appropriate share of the registry fees, it is critical to know the identity of each seller that pays the fee, and on whose behalf each telemarketer or service provider is accessing the national registry. Thus, the Commission will continue to require, in § 310.8(e), that if a person is accessing the national registry on behalf of other sellers, that person must identify each of the other sellers.

D. Seller and Telemarketer Liability

In the Revised Fee NPRM, the Commission proposed, in Section 310.8(a) of the Rule, to make sellers directly liable for initiating, or causing a telemarketer to initiate, an outbound telephone call without first paying the appropriate fee for access to the national registry. The Commission also proposed, in Section 310.8(b), to make telemarketers directly liable for initiating an outbound telephone call on behalf of a seller without first ensuring that their seller-clients have paid for up-to-date access to the National Do Not Call Registry. The Commission proposed imposing this liability under the authority of the Appropriations Act and the Implementation Act, in addition to the Telemarketing Act, which provides the authority for the other portions of the Amended TSR.

This proposed liability engendered a wide range of comment. For example, NCL stated: "The FTC's proposal to

hold sellers and any entities acting on their behalf directly liable for compliance with the fee requirements is absolutely crucial to prevent abuses in this regard."[43] On the other hand, IMC maintained that liability should not exist unless a seller or telemarketer calls a consumer who had placed their number on the registry. According to IMC, liability for simply failing to purchase the list is unrelated to any consumer privacy interest and is unconstitutional.[44]

As the Commission stated in the Revised Fee NPRM, direct liability on sellers and telemarketers is necessary to effectuate fairly the mandate of the Appropriations Act and the Implementation Act, which authorize the Commission to collect fees sufficient to cover the costs of implementing and enforcing the "do-not-call" provisions of the Amended TSR. Without such direct liability, the Commission remains concerned that not all entities that obtain information from the national registry will pay their fair share of the fees for that information, resulting in increased fees for those entities that do pay. The Commission continues to believe that the most effective way to ensure that all covered sellers pay their fair share of the registry fees is to impose direct liability upon them if they initiate, or cause a telemarketer to initiate, a call to a consumer without first paying the appropriate annual fee.

As for telemarketer liability, a number of commenters suggested that "where a service bureau has reasonably relied on evidence that its seller clients have paid for access, the service bureau should not be held liable for the seller's lack of compliance."[45] The Commission agrees that telemarketers

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[43] NCL-Revised Fee at 1-2.

[44] IMC-Revised Fee at 5-6.

[45] DMA-Revised Fee at 15. *See* also IMC-Revised Fee at 6 (suggesting the Final Fee Rule should "allow a telemarketer to legally rely on a seller providing a working access number as conclusive proof that the seller has properly purchased access to the registry"); ARDA-Revised Fee at 3.

can rely on the registry for proof of payment as long as that reliance is reasonable given the totality of the circumstances. If a telemarketer or list broker accesses the national registry on behalf of a seller-client and presents that seller-client's unique account number, the telemarketer will be able to determine whether the seller's account is paid up to date, and the extent of access allowed by that payment. The telemarketer or service provider may rely on that information as proof of the seller's payment.

Thus, Sections 310.8(a) and (b) continue to impose direct liability on sellers and telemarketers. The failure of a covered seller to pay the appropriate fee prior to initiating or causing another entity to initiate an outbound telephone call and the failure of a telemarketer to ensure that a covered seller has paid the appropriate fee prior to initiating an outbound telephone call on its behalf are violations of the Amended TSR, and subject the seller and telemarketer to all remedies available for such violations.

E. Corporate Divisions, Subsidiaries, and Affiliates

In the Revised Fee NPRM, the Commission proposed to treat each separate division, subsidiary, or affiliate of a corporation as a separate seller for purposes of Section 310.8. The Commission rejected comments suggesting that separate subsidiaries, divisions, or affiliates of the same corporation be treated as a single seller, stating that such treatment could greatly diminish the number of entities that will pay for access to the national registry, provide an unjust advantage to larger, multi-divisional corporations, and potentially increase the fees required to be paid by smaller, less complex corporate entities.

NCL agreed with the Commission's proposal, stating that allowing separate subsidiaries, divisions, and affiliates "to be considered as one seller, even though they would likely be conducting telemarketing campaigns for quite different

products or services, would create an inequitable situation for smaller companies and threaten the financial viability of the registry."[46] On the other hand, this proposal was significantly criticized by industry commenters.[47] They noted that companies organize into affiliated entities for tax, regulatory and historical reasons, often beyond their control.[48] For example, SBC noted that due to statutory and regulatory requirements, it would be required to pay over 44 separate annual fees, even though the services provided by its separate subsidiaries and affiliates are similar and consumers have a reasonable expectation that they are dealing with one company.[49] West stated that the proposal would cause it problems, since telemarketers such as itself would need to understand the corporate divisional structure of their seller-clients, which is not always clear.[50] In addition, a number of commenters noted that this proposal appeared contrary to the Commission's assertion, stated in the Revised Fee NPRM, that the agency did not want to charge the same company multiple times for access to the national registry.[51]

Many commenters suggested, as an alternative, that the Commission should use the "consumer expectation" factors set forth in the Amended TSR Statement of Basis and Purpose that apply to the established business relationship

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[46] NCL-Revised Fee at 2.

[47] *See*, e.g., ARDA-Revised Fee at 4; BOA-Revised Fee at 2; DMA-Revised Fee at 11-12; ERA-Revised Fee at 5-6; Household-Revised Fee at 2; IMC-Revised Fee at 5; MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4; Verizon-Revised Fee at 1-4; VISA-Revised Fee at 2.

[48] *See* BOA-Revised Fee at 2; SBC Revised Fee at 2-4; VISA-Revised Fee at 2.

[49] SBC-Revised Fee at 2. *See* also Verizon-Revised Fee at 1-4 (Verizon includes roughly two dozen separate corporations that engage in telemarketing).

[50] West-Revised Fee at 3.

[51] *See*, e.g., MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4.

exemption to determine whether separate divisions, subsidiaries, or affiliates must pay the annual fee; namely, would consumers reasonably perceive the entity as a single seller based on the nature and type of goods or services sold and the identity of the division, subsidiary or affiliate.[52] On the other hand, another commenter noted that such factors do not provide sufficient notice as to whether any particular division would be required to separately purchase access to the national registry, and that the final rule must provide "a more definitive definition of the circumstances that would subject multiple divisions to separate fee obligations."[53]

The Commission agrees that, for purposes of assessing a fee, the test to determine who must pay must be more specific and clear cut than the "consumer expectation" test established for the established business relationship exemption. The "consumer expectation" test works for determining whether a company has violated the established business relationship exemption because it is consumers themselves who will state, in their complaints, that they did not believe the company that called was related to the company with which they had done business in the past. There will be no such consumer arbiters to determine who should pay the fee. The Commission does agree, however, that those factors are appropriate ones to consider in determining which divisions, subsidiaries, or affiliates should pay a fee.

To develop a more bright line test for which entities must pay, while taking the consumer expectation factors into consideration, the Commission will require separate divisions, subsidiaries, or affiliates to pay a separate annual fee for access to the national registry under the following circumstances: (1) The entity is separately incorporated or, for a

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[52] ARDA-Revised Fee at 4; ERA-Revised Fee at 5-6; MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4.

[53] BOA-Revised Fee at 2.

non-corporate entity such as a partnership, is a similarly distinct legal entity; and (2) the entity has or markets under a different name. If the name difference reflects only a geographic distinction, that will not be sufficient to require the entity to pay a separate fee for access. For example, "ABC Marketer of Oklahoma, Inc." would not be considered a separate seller, for purposes of the Fee Rule, from its affiliate, "ABC Marketer of Texas, Inc." On the other hand, if the name difference reflects some other distinction, such as product or service, then the separately-incorporated entity would be required to pay a separate fee for access. For example, "John's Books and Games, Inc." would be considered a separate seller from its subsidiary, "John's Computers, Inc."[54]

IV. Calculation of Fees

A. Number of Entities Accessing the National Registry

The first step in establishing the appropriate fees to charge entities that access consumer telephone numbers included in the national registry is to estimate the number of such entities that would be required to pay the fee. In both the User Fee NPRM and the Revised Fee NPRM, the Commission acknowledged that this step is among the most difficult, given the dearth of information about the number of companies currently in the marketplace who make outbound tele-

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[54] The Commission does not believe these changes to the treatment of corporate subsidiaries and affiliates warrant any change to the estimate of the number of entities that will pay for access to the national registry, discussed below. There is no evidence on the record to indicate that the types of subsidiaries and affiliates which no longer will be considered separate sellers under the Final Fee Rule are numerous or widespread throughout the telemarketing industry.

marketing calls to consumers.[55] In the User Fee NPRM, the Commission determined, after examining relevant industry literature and the record in this and past TSR rulemaking proceedings, that the most pertinent information for determining the number of firms that would be required to pay the proposed user fee would be the number of firms that access state do-not-call registries. At that time, the most telemarketing firms that accessed any individual state registry was 2,932. Thus, to propose a realistic fee structure that would ensure sufficient funds would be collected to cover the costs of a national registry, the Commission estimated in the User Fee NPRM that 3,000 entities would pay for access to the information in the national registry. The Commission sought comment and evidence to determine whether this estimate was realistic and appropriate.

Of the 34 comments received in response to the User Fee NPRM, only one commenter provided any information relevant to this inquiry, stating the number of clients for which it would have to obtain access to the national registry. In addition, a second commenter provided some company-specific information. Based on these comments, the Commission proposed a new estimate of the number of firms that will access the national registry, developed through a calculation using the limited information provided in the comments, combined with relevant industry-wide data available and the Commission's knowledge of the industry. Based on this detailed calculation, set out in the Revised Fee NPRM, the Commission estimated that the total number of firms that would access the national registry would be 7,500.[56]

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[55] *See* User Fee NPRM, 67 FR at 37363-64, Revised Fee NPRM, 68 FR at 16241.

[56] *See* Revised Fee NPRM, 68 FR at 16241-42.

As the Commission stated in the Revised Fee NPRM, this calculation made a number of significant assumptions based on the best information available to the agency at that time. The Commission asked specific questions about each of these assumptions, seeking information as to their reliability. The Commission also asked commenters to provide any information they could about any and all of these assumptions, including company-specific information and data that could help the agency to refine its estimates of the number of firms that will need to access the national registry.

Once again, the Commission received virtually no comments providing information on the validity of the Commission's assumptions. One "leading teleservices company" stated that one of the Commission's assumptions—sellers that use third-party telemarketers on average employ three different telemarketers to make calls to consumers over the course of a year—was "generally accurate."[57] Two telemarketer commenters stated that most of their clients market nationwide.[58] Otherwise, the comments provided no information on this question whatsoever. Instead, the major industry association commenters faulted the Commission's calculations, claiming that they are "largely without empirical foundation,"[59] "speculative and largely unsupported" and "completely arbitrary."[60]

As previously stated, the Commission's calculations are based on the best information available to the agency at this time. Although the Commission has requested information on this issue on a number of prior occasions, the very entities that have access to such information have rebuffed the agency at every stage. The Commission has no obligation to "conduct

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[57] IMC-Revised Fee at 1, 4.

[58] *Id.* at 4-5; West-Revised Fee at 3.

[59] DMA-Revised Fee at 8.

[60] ERA-Revised Fee at 7-8. *See* also MPA-Revised Fee at 6.

a comprehensive study of the telemarketing industry" to determine the proper fees, as suggested by the DMA.[61] In fact, it has reason to doubt such a study would be productive, given the industry's ongoing reticence in this area. The Commission has undertaken substantial efforts to determine the number of entities that will be required to access the national registry. It has scoured industry literature, reviewed and analyzed numerous rounds of comments on this issue, and used its knowledge of the industry to make basic assumptions about its operation. Given this review and analysis, and the limited information provided in the comments, the Commission continues to believe that its original estimate that 7,500 entities will be required to pay for access to the national registry is reasonable and appropriate.

However, given the new FCC Rules, additional entities, originally exempt from the Amended TSR, now will be required to access the national registry. In the Revised Fee NPRM, the Commission estimated that a total of 10,900 firms engage in outbound telemarketing to consumers.[62] The Commission reduced that number to account for firms that are engaged in charitable solicitations, firms that are calling directly from sellers exempt from FTC regulation, and firms that make only intrastate calls. Of that group, after the adoption of the FCC Rules, only firms that engage in charitable solicitations remain exempt from the requirement to access the national registry. The Commission estimates that 900 entities engage exclusively in such charitable solicitations, resulting in our revised estimate that 10,000 entities will be required to access the national registry.

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[61] DMA-Revised Fee at 8-10.

[62] *See* Revised Fee NPRM, 68 FR at 16242.

B. Access by Area Code; Small Business Access

In both the User Fee NPRM and the Revised Fee NPRM, the Commission proposed a fee structure based on the number of different area codes of data that an entity wished to use annually.[63] The Commission received no comments on this issue in response to the Revised Fee NPRM. As a result, the Commission will continue to charge for access to the national registry based on the number of area codes of information an entity requests.

As for small business access to the national registry, the Commission proposed, in both the User Fee NPRM and the Revised Fee NPRM, to provide free registry access to any firm wishing to obtain data from only one to five area codes.[64] The Commission proposed such free access to limit the burden placed on small businesses that only require access to a small portion of the national registry. The Commission noted that its proposal was consistent with the mandate of the Regulatory Flexibility Act, 5 U.S.C. 601, which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact.[65] In the Revised Fee NPRM, the Commission sought comment on other alternatives that would balance the burdens faced by small businesses with the need to raise appropriate fees to fund the registry in an equitable manner, as well as on the appropriate level of free access.

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[63] *See* User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16242.

[64] *See* User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16243-44.

[65] *See* also Section VII, below, where the Commission determines that the instant proposed Rule would not have a significant economic impact on a substantial number of small entities.

The Commission received few comments in response to this proposal in the Revised Fee NPRM. NCL found the Commission's proposal "reasonable."[66] S&K, on the other hand, stated that the Commission should grant access to five or maybe even ten area codes for free, and "employ a graduated system that places the majority of the fees on the largest scale sellers or telemarketers, as determined by a mixture of revenues, profits, subsidiaries and overall cost structure."[67] In contrast, ATA contended that the proposed fee was unconstitutional precisely because it would impose differential treatment, shift the burden to certain sellers to pay for fees in excess of the benefits they would receive, and thus target and penalize the largest entities more than simply favor small businesses.[68] ATA also expressly warned that a fee justified largely by the gross revenue of paying sellers would not survive judicial scrutiny.[69] ARDA suggested that the Commission should make access to the first five area codes free for all sellers. According to ARDA, the "small business that purchases that sixth area code is punished by having to pay for the first five. The small-to-medium business would be less inclined to circumvent the fee requirement if it were only required to pay an incremental cost ($29) for the sixth and seventh and so forth area codes rather than $174 for one additional area code."[70]

After evaluating all of the comments received in this proceeding, the Commission continues to believe that providing access to five area codes of data for free is an

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[66] NCL-Revised Fee at 2.

[67] S&K-Revised Fee at 2.

[68] ATA-Revised Fee at 10-11.

[69] *Id.* at 12.

[70] ARDA-Revised Fee at 6. *See* also ATA-Revised Fee at 8. The FCC Rules note that thirty-three states currently have five or fewer area codes. *See* FCC Rules at) 54.

appropriate compromise between the goals of equitably and adequately funding the national registry, on the one hand, and providing appropriate relief for small businesses, on the other.[71] Moreover, the Commission is persuaded that it would be more equitable to provide all firms free access to up to five area codes, rather than to only those firms that access five or fewer area codes. It is true that a relatively small firm could need to access six area codes of data. It does not seem fair to charge that firm the full cost for all six area codes, simply because it needed access to one area code more than another small firm. The marginal cost of that sixth area code should not be so high. As a result, the Commission will provide the first five area codes of data from the national registry free to all entities that gain access. Section 310.8 of the Fee Rule is revised accordingly.

C. Fees for Access

As set forth in the Background Section of this Statement, both the Appropriations Act and the Implementation Act authorize the Commission to assess fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at $18.1 million for fiscal year 2003. The Commission continues to anticipate that it will need to raise the entire estimated $18.1 million authorized to cover the costs associated with those efforts in this fiscal year. A number of commenters claimed that the

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[71] The Commission continues to believe, as stated in the Revised Fee NPRM, that providing small businesses with exemptive relief more directly tied to size status would not balance the private and public interests at stake any more reasonably than the approach selected. Any reduced fee schedule based on a small business' size, revenues, or profits would require a certification and determination of that status to implement and enforce, and thus would present greater administrative, technical, and legal costs and complexities than the approach selected by the Commission, which does not require proof or verification of small business status. *See* Revised Fee NPRM, 68 FR at 16243, n.52.

Commission failed to provide any indication how it intends to spend the $18.1 million, and that the costs are not justified or necessary.[72] The Commission disagrees.

As stated in the Revised Fee NPRM, costs for the National Do Not Call Registry fall primarily into three broad categories.[73] First are the actual estimated contract costs along with associated agency costs to develop and operate the national registry. This includes items such as handling consumer registration and complaints, the transfer of registration information from state lists to the registry, telemarketer access to the registry, and the management and operation of law enforcement access to appropriate information. The second category of costs relates generally to enforcement efforts. These costs will include law enforcement initiatives, both domestic and international, to identify targets and challenge alleged violators. Enforcement costs also include consumer and business education, which are critical complements to enforcement in securing compliance with the "do-not-call" provisions. The third category of costs covers agency infrastructure and administration costs, including information technology structural supports. In particular, the Consumer Sentinel system (the agency's repository for all consumer fraud-related complaints) and its attendant infrastructure are being upgraded to handle the anticipated increased demand from state law enforcers for access to "do-not-call" complaints. Further, the Consumer Sentinel system will require substantial changes so that it can handle the significant additional volume of complaints that is expected.

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[72] *See* DMA-Revised Fee at 2-6; ERA-Revised Fee at 6-7; MPA-Revised Fee at 5-6.

[73] *See* Revised Fee NPRM, 68 FR at 16244.

To raise $18.1 million this fiscal year, and assuming that 10,000 firms will pay for that access,[74] the Commission will charge an annual fee of $25 for each area code of data accessed.[75] There will be no fee charged to any entity for access to the first five area codes of data. In addition, the Commission will place a cap of $7,375 as the maximum annual fee that will be charged an entity that wants access to the entire national database. The maximum fee will now be charged for accessing 300 area codes of data or more.[76] As a

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[74] A number of commenters continued to suggest that consumers should pay a portion of the costs to implement and operate the national registry. *See*, e.g., ARDA-Revised Fee at 7; IMC-Revised Fee at 7; MPA-Revised Fee at 7; PDS-Revised Fee at 1-3. As stated in the User Fee NPRM, the Commission does not believe it is appropriate to charge consumers to protect their privacy from unwanted and abusive telemarketing calls. *See* User Fee NPRM, 67 FR at 37363. In addition, the Implementation Act clearly authorizes the Commission to raise the appropriate fees from the industry, and not from consumers.

[75] In the Revised Fee NPRM, the Commission assumed that, on average, sellers will pay to obtain information from 83 area codes of data in the national registry. *See* Revised Fee NPRM, 68 FR at 16244, n. 56. The addition of entities making intrastate calls will reduce the average number of area codes entities will pay to obtain from the national registry, as will our decision to allow all entities to obtain five area codes of data for free. As a result, the Commission is now estimating that the average entity accessing the national registry will purchase 73 area codes of data.

[76] The Commission is capping the maximum amount that will be charged for access to the entire national registry to ease the administrative burdens of operating the system and those faced by the largest users of the registry. There are currently 317 area codes included in the national registry, and more area codes are added on an irregular schedule. If there were no maximum fee for access to the national registry, every time a new area code were added, all entities that had paid for access to the entire database would be required to pay an additional fee prior to being able to download the national list. The Commission does not consider the limited additional fees that such a requirement would generate to outweigh this burden. More limited users, on the other hand, who have asked for a specific list of area codes of data, will need to change the scope of their access if they wish to obtain any newly added area codes. Because they

result of this Fee Rule, examples of fees that will be charged for various levels of access to the national registry are as follows: obtaining up to five area codes of data would have no charge; six area codes of data would cost $25; seven area codes would cost $50; thirty area codes would cost $625; two hundred area codes would cost $4,875; and access to the data from all area codes would be capped at $7,375 annually.[77]

As stated above and in the Revised Fee NPRM, these fees are based on certain assumptions and estimates. The Commission anticipates that these fees may need to be reexamined periodically and adjusted, in future rulemaking proceedings, to reflect actual experience with operating the registry.

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already will be asking for a change in their access rights, it will be less of an administrative burden to charge those entities for the additional area codes. Thus, contrary to ATA's suggestion, the cap in the proposed fee structure is sufficiently related to a consideration of the actual administrative costs of the registry to justify its use. *See* ATA-Revised Fee at 9.

[77] DMA contends that while "a nominal fee unrelated to content of the speech may be permissible under certain circumstances,". . . . "a much lower fee [than the Commission has proposed] is also needed to conform with Supreme Court First Amendment jurisprudence on monetary restrictions on speech." DMA-Revised Fee at 1-2, 6-7. *See* also ATA-Revised Fee at 15. Contrary to the DMA's comment, the fee need not be "nominal" so long as it is related sufficiently to the costs of administration and enforcement. Moreover, "[n]ominal is necessarily a relative term, to be judged by how substantial something is when [viewed in its context." *National Awareness Foundation v. Abrams*, 812 F.Supp. 431, 433 (S.D.N.Y. 1994), aff'd 50 F.3d 1159 (2d Cir. 1995). The Commission believes that the $25 fee per area code is nominal, as is the maximum fee of $7,375 for nationwide access, when considered in the context of an annual fee for members of the telemarketing industry engaged in commercial speech. Cf. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1949)(upholding a fee up to $300, in 1938 dollars, for a one-day permit to engage in fully protected speech).

V. Operation of the National Registry for the Telemarketing Industry

The Commission is developing a fully-automated, secure website dedicated to providing members of the telemarketing industry with access to the registry's list of telephone numbers, sorted by area code. The first time an entity accesses the system, it will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If an entity is accessing the registry on behalf of a seller-client, the entity also will need to identify that client.

The only consumer information that companies will receive from the national registry is a registrant's telephone number. Those telephone numbers will be sorted and available by area code. Companies will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state. Of course, companies also will be able to access the entire national registry, if desired. In addition, after providing the required identifying information and paying the appropriate fee, if any, companies will be allowed to check, via interactive Internet pages, a small number of telephone numbers (less than ten) at a time to permit small volume callers to comply with the national registry requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area.

As previously stated, sellers, telemarketers and other service providers will be allowed to access the national registry. When a seller first submits an application to access registry information, the company will be asked to specify the area codes that it wants to access. As discussed above, each seller accessing the registry data will be required to pay an annual fee, based on the number of area codes of data the seller accesses. Fees will be payable via credit card (which

will permit the real-time transfer of data) or electronic funds transfer (which will require the seller to wait approximately three days for the funds to clear before data access will be provided). A seller must pay these fees prior to gaining access to the registry, and may do so either directly or through another entity to which the seller has provided the necessary authority.

Sellers will be able to access data as often as they like during the course of one year (defined as their "annual period") for those area codes for which they have paid. However, to protect system integrity, an account number will support a download of the entire national registry only once in any 24-hour period. If, during the course of their annual period, sellers need to access data from more area codes than those initially selected, they would be required to pay for access to those additional area codes. For purposes of these additional payments, the annual period is divided into two semi-annual periods of six months each. Obtaining additional data from the registry during the first semi-annual, six month period will require a payment of $25 for each new area code. During the second semi-annual, six month period, the charge of obtaining data from each new area code requested during that six-month period is $15. These payments for additional data would provide sellers access to those additional areas of data for the remainder of their annual term.

After payment is processed, the seller will be given a unique account number and permitted access to the appropriate portions of the registry. That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, sellers will be able to download either a full updated list of numbers from their selected area codes, or a more limited list, consisting only of changes to the registry that have occurred since the company's last download. This would limit the

amount of data that a company needs to download during each visit.

Telemarketers and other service providers working on behalf of sellers may obtain access to the registry either directly or through the use of their seller-client's unique account number. If access is gained directly, i.e., the telemarketer or service provider decides to obtain the information on its own behalf, either voluntarily or to satisfy other legal requirements, that telemarketer or service provider will need to comply with all requirements placed on sellers accessing the registry, as previously discussed in this Section. Such telemarketers and service providers will be provided a unique account number that can be used only by that company, i.e., that account number will not authorize other companies to access the registry on behalf of the telemarketer or service provider. On the other hand, if telemarketers or service providers are accessing the registry through the use of their seller-client's account number, the extent of their access will be limited to the area codes requested and paid for by their seller-clients. They also will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid by their seller-clients.[78] As indicated in the Rule NPRM discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or telemarketer to employ a version of the do-not-call registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

Data will be available from the national registry using Internet-based formats and download methods that serve both small and large businesses. Data also will be available in three different sets: full lists, change lists, and small list

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[78] Telemarketers and service providers working on behalf of sellers also will be limited to downloading the entire national registry only once in any 24-hour period.

lookups. For the full lists and the change lists, downloads may be accomplished via a web browser or a programmatic web service. For the small list lookup, a web page will allow a person to enter from one to ten telephone numbers on a form. After entering the numbers and clicking a button, the national registry will display on the web page the list of numbers entered and whether each number is in the national registry or not.

With a web browser, a person will access a secure web page that will allow the person to select: a national download (all area codes), all area codes from individual states, or individual area codes.[79] After selecting the area codes, the person will choose a flat text file or an XML tagged data file. The person also will choose a zipped or unzipped file. After making these selections, the person will click a "download" button and be prompted to save the file to his or her company computer. If the person chooses the full list, the flat file will contain just ten-digit telephone numbers, with a single number on each line. For the change list in flat file format, each line of the file will contain a telephone number, the date of the change, and an "A" (for Added) or "D" (for Deleted). The change list data will be fixed-width fields.

The alternative to web browser downloads will be programmatic web services using XML tagged data. This will assist larger companies in automating downloads of the national registry. The XML tags will include the following: a login and encrypted password; the name and email address of the company contact person; certification that access to the registry is solely to comply with the provisions of this Rule; the account number(s) for which the download is being performed; the area code of the telephone numbers to be

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[79] When new area codes are added, the "by state" display temporarily will show a new area code proximate to but separate from its state, to ensure that the new area code has been paid for.

downloaded; and whether a full list or change list is to be downloaded.

Entities that select a change list will be provided all telephone numbers that have been added to, or deleted from, the registry since the date of their previous access. Change lists, for both flat files and XML tagged data, will be available to provide changes on a daily basis (representing the additions and deletions from the day before).

The telemarketer website on the national registry will have a help desk available during regular business hours via a secure electronic form.

VI. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. ("PRA"), the Commission sought public comments on the information collection activities contained in the Final Fee Rule. *See* 67 FR 37362 (May 29, 2002); 68 FR 16238 (April 3, 2003). The Commission received no comments on its PRA analysis nor has it modified its proposal in any manner that necessitates revising its original burden estimates for the Final Fee Rule.[80] The Commission additionally sought clearance from OMB for those information collection requirements, and obtained it on July 24, 2003, under OMB Control No. 3084-0097.

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[80] While the Commission is increasing its estimate of the number of entities that must pay for access to the national registry, that increase is created by the FCC Rules, which require entities exempt from the FTC's jurisdiction to gain access. Accordingly, the paperwork burden faced by those entities will be reported by the FCC, rather than the FTC. In addition, entities that access the national registry solely because of the FCC Rules are not required to comply with the recordkeeping provisions of the Amended TSR. As a result, the increase in the Commission's estimate of the number of entities required to access the national registry does not affect that aspect of the Commission's prior PRA burden estimates.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 et seq., requires the agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") with its proposed rule, and a Final Regulatory Flexibility Analysis ("FRFA") with its final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the User Fee NPRM, the Revised Fee NPRM, and this Statement, the Commission does not expect that its Fee Rule will have the threshold impact on small entities. Nonetheless, the Commission published an IRFA with the User Fee NPRM, and is also publishing a FRFA with its Final Fee Rule below, in the interest of further explaining its determination, even though the Commission continues to believe that it is not required to publish such analyses.

1. Reasons for Consideration of Agency Action

The Final Fee Rule has been considered and adopted pursuant to the requirements of the Implementation Act and the Appropriations Act, which authorize the Commission to collect fees sufficient to implement and enforce the "do-not-call" provisions of the Amended TSR.

2. Objectives of and Legal Basis for the Final Rule

As explained above, the objective of the Final Fee Rule is to collect fees from entities engaged in telemarketing, pursuant to the legal authority set forth in the Implementation Act and Appropriations Act.

3. Description and Estimate of Number of Small Entities Affected by the Final Rule

As explained in the Revised Fee NPRM, comments submitted by the Small Business Administration cited to information from the North American Industry Classification

System ("NAICS"), suggesting that there are 2,305 firms identified as "telemarketing bureaus," and that 1,279 of those firms may qualify for small business status, i.e., annual receipts of $5 million or less.[81] Because sellers, and not "telemarketing bureaus," constituted the relevant small entities affected by the Revised Fee NPRM, the Commission sought further public comment and information on the number of small business sellers engaged in outbound telemarketing and subject to the FTC's jurisdiction, since the NAICS classification system does not provide this level of detail.[82] The Commission received no further information in response to this request for comment. As a result, the agency is unable at this time to provide a reliable estimate of the number of affected sellers. In any event, as explained elsewhere in this Statement, the Commission believes that, to the extent the Final Fee Rule has an economic impact on small business, the Commission has adopted an approach that minimizes that impact to ensure that it is not substantial, while fulfilling the legal mandate of the Implementation Act and Appropriations Act to ensure that the telemarketing industry supports the cost of the National Do Not Call Registry.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

These requirements were discussed in the Revised Fee NPRM section regarding agency information collection activities subject to OMB approval under the PRA.[83] The information collection activities at issue consist principally of the requirement that firms, regardless of size, that access the national registry submit minimal identifying and payment

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[81] *See* 68 FR at 16246 n.65.

[82] *Id.*

[83] *See* Revised Fee NPRM, 68 FR at 16245.

information, which is necessary for the agency to collect the required fees.

Compliance requirements of the Final Fee Rule, other than information collection requirements within the meaning of the PRA, are discussed elsewhere in this document and in the User Fee NPRM and Revised Fee NPRM. In sum, as noted earlier, small entities and all other entities subject to the Final Fee Rule are required to pay and obtain access to the National Do Not Call Registry in order to reconcile their calling lists with the phone numbers maintained in the national registry.

5. Duplication With Other Federal Rules None.

6. Description of Any Significant Alternatives to the Final Rule

As discussed in the User Fee NPRM, the Commission considered a number of alternatives to the proposed fees.[84] In both the User Fee NPRM and Revised Fee NPRM, the Commission solicited comment on any significant alternatives that would further minimize the impact on small entities consistent with the objectives stated in those Notices, the Appropriations Act and the Implementation Act. As discussed elsewhere in this Statement, the Commission finds that no significant alternatives are available consistent with those objectives.

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

VIII. Final Rule

Accordingly, for the reasons set forth above, the Commission hereby amends part 310 of title 16 of the Code of Federal Regulations as follows:

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[84] *See* User Fee NPRM, 67 FR at 37367.

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101-6108.

2. Add § 310.8 to read as follows:

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $25 per area code of data accessed, up to a maximum of $7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the Registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $25 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency

that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the Registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

By direction of the Commission.

Donald S. Clark,
Secretary.

Appendix A

List of Acronyms for the TSR Revised Fee Proposal Commenters

Commenter—Acronym
American Bankers Association—ABA
American Resort Development Association—ARDA
American Teleservices Association—ATA
Bahe, Kevin—KB
Bank of America—BOA
Bouffard, David L.—DB
Brown, Jarrett—JB
Citigroup Inc.—Citi
Convergys Corporation—Convergys
Direct Marketing Association—DMA
Electronic Retailing Association—ERA
Financial Services Roundtable—FSR
Girty, John—JG
Goldstein, Mitchell P.—MG
Greene, Shawn—SG
Household Bank (SB), N.A.—Household
Infocision Management Corporation—IMC
Jamtgaard, O. G. Jr.—OJ
Johnson, Jeff—JJ
Lamonds, Cheryl E.—CL
Magazine Publishers of America—MPA
McGowan, Dilton—DM
National Consumers League—NCL
Phone Data Strategies—PDS
Pressley, Bob—BP
Samuels, Sara—SS
SBC Communications Inc.—SBC
Scheid, Justin & Matt Kiverts—S&K
Scott, Richey L.—RS
Smith, Jenna—JS
Stora, Christine—CS

Stutes, Gerald—GS
The Verizon companies—Verizon
VISA U.S.A.—VISA
West Corporation—West

(2) No. 03- 031552 MAY 14 2004

IN THE

Supreme Court of the United States

AMERICAN TELESERVICES ASSOCIATION, MAINSTREAM MARKETING SERVICES, INC., AND TMG MARKETING, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (Continued) VOLUME II

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APPENDIX G

[SEAL] FEDERAL TRADE COMMISSION
RULES and REGULATIONS

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16 CFR Part 310 Telemarketing Sales Rule

Wednesday, January 29, 2003

AGENCY: Federal Trade Commission.

ACTION: Final Amended Rule.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues its Statement of Basis and Purpose ("SBP") and final amended Telemarketing Sales Rule ("amended Rule"). The amended Rule sets forth the FTC's amendments to the Telemarketing Sales Rule ("original Rule" or "TSR"). The amended Rule is issued pursuant to the Commission's Rule Review, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act").

EFFECTIVE DATES: The amended Rule will become effective March 31, 2003. Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry.

ADDRESSES: Requests for copies of the amended Rule and this SBP should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the amended Rule and SBP, are available at http:// www.ftc.gov.

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326-2452, Karen Leonard, (202) 326-3597, Michael Goodman, (202) 326-3071, or Carole Danielson, (202) 326-3115, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended Rule: (1) retains most of the original Rule's requirements concerning deceptive and abusive telemarketing acts or practices without major substantive changes; (2) establishes a national "do-not-call" registry maintained by the Commission; (3) defines "upselling" to clarify the amended Rule's application to these transactions, requires specific disclosures for upsell transactions, and expressly excludes upselling transactions from certain exemptions in the amended Rule; (4) requires that sellers and telemarketers accepting payment by methods other than credit and debit cards subject to certain protections obtain express verifiable authorization from their customers; (5) retains the exemptions for pay-per-call, franchise, and face-to-face transactions, but makes these transactions subject to the national "do-not-call" registry and certain other provisions in the abusive practices section of the Rule; (6) specifies requirements for the use of predictive dialers; (7) requires disclosures and prohibits misrepresentations in connection with the sale of credit card loss protection plans; (8) requires an additional disclosure in connection with prize promotions; (9) requires disclosures and prohibits misrepresentations in connection with offers

that include a negative option feature; (10) eliminates the general media and direct mail exemptions for the telemarketing of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule [1]; (11) requires telemarketers to transmit caller identification information; (12) eliminates the use of post-transaction written confirmation as a means of obtaining a customer's express verifiable authorization when the goods or services are offered on a "free-to-pay conversion" basis; (13) prohibits the disclosure or receipt of the customer's or donor's unencrypted billing information for consideration, except in limited circumstances; and (14) requires that the seller or telemarketer obtain the customer's express informed consent to all transactions, with specific requirements for transactions involving "free-to-pay conversions" and preacquired account information.

Statement of Basis and Purpose

I. Background

A. Telemarketing and Consumer Fraud and Abuse Prevention Act.

The early 1990s saw heightened Congressional attention to burgeoning problems with telemarketing fraud.[2] The culmination of Congressional efforts to protect consumers

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[1] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures ("Franchise Rule"), 16 CFR Part 436.

[2] Statutes enacted by Congress to address telemarketing fraud during the early 1990s include the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. 227 *et seq.*, which restricts the use of automatic dialers, bans the sending of unsolicited commercial facsimile transmissions, and directs the Federal Communications Commission ("FCC") to explore ways to protect residential telephone subscribers' privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 2325 *et seq.*, which provides for enhanced prison sentences for certain telemarketing-related crimes.

against telemarketing fraud occurred in 1994 with the passage of the Telemarketing Act, which was signed into law on August 16, 1994.[3] The purpose of the Act was to combat telemarketing fraud by providing law enforcement agencies with new tools and to give consumers new protections.

The Telemarketing Act directed the Commission to issue a rule prohibiting deceptive and abusive telemarketing acts or practices, and specified, among other things, certain acts or practices the FTC's rule must address. The Act also required the Commission to include provisions relating to three specific "abusive telemarketing acts or practices:" (1) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive of his or her right to privacy; (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all sales calls to consumers that the purpose of the call is to sell goods or services, and make other disclosures deemed appropriate by the Commission, including the nature and price of the goods or services sold.[4] Section 6102(a) of the Act not only required the Commission to define and prohibit deceptive telemarketing acts or practices, but also authorized the FTC to define and prohibit acts or practices that "assist or facilitate" deceptive telemarketing.[5] The Act further directed the Commission to consider including recordkeeping requirements in the rule.[6] Finally, the Act authorized state Attorneys

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[3] 15 U.S.C. 6101-6108.

[4] 15 U.S.C. 6102(a)(3)(A)-(C).

[5] Examples of practices that would "assist or facilitate" deceptive telemarketing under the Rule include credit card laundering and providing contact lists or promotional materials to fraudulent sellers or telemarketers. See 60 FR 43842, 43853 (Aug. 23, 1995).

[6] 15 U.S.C. 6102(a)(3).

General, other appropriate state officials, and private persons to bring civil actions in federal district court to enforce compliance with the FTC's rule.[7]

B. Original Rule.

The FTC adopted the original Rule on August 16, 1995.[8] The Rule, which became effective on December 31, 1995, requires that telemarketers promptly tell each consumer they call several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win.[9] Telemarketers must, in any telephone sales call, also disclose cost and other material information before consumers pay.[10] In addition, the original Rule requires that telemarketers have consumers' express verifiable authorization before using a demand draft (or "phone check") to debit consumers' bank accounts.[11] The original Rule prohibits telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located), and from calling consumers who have said they do not want to be called by or on behalf of a particular seller.[12] The original Rule also prohibits misrepresentations about the cost, quantity, and other material aspects of the offered goods or services, and the terms and conditions of the offer.[13] Finally, the original Rule bans telemarketers who offer to arrange loans, provide credit repair services, or

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[7] 15 U.S.C. 6103, 6104.

[8] 60 FR at 43842 (codified at 16 CFR 310 (1995)).

[9] 16 CFR 310.4(d).

[10] 16 CFR 310.3(a)(1).

[11] 16 CFR 310.3(a)(3).

[12] 16 CFR 310.4(c), and 310.4(b)(1)(ii).

[13] 16 CFR 310.3(a)(2).

recover money lost by a consumer in a prior telemarketing scam from seeking payment before rendering the promised services,[14] and prohibits credit card laundering and other forms of assisting and facilitating fraudulent telemarketers.[15]

The Rule expressly exempts from its coverage several types of calls, including calls where the transaction is completed after a face-to-face sales presentation, calls subject to regulation under other FTC rules (e.g., the Pay-Per-Call Rule,[16] or the Franchise Rule),[17] calls initiated by consumers that are not in response to any solicitation, calls initiated by consumers in response to direct mail, provided certain disclosures are made, and calls initiated by consumers in response to advertisements in general media, such as newspapers or television.[18] Lastly, catalog sales are exempt, as are most business-to-business calls, except those involving the sale of non-durable office or cleaning supplies.[19]

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[14] 16 CFR 310.4(a)(2)-(4).

[15] 16 CFR 310.3(b) and (c).

[16] Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("Pay-Per-Call Rule"), 16 CFR Part 308.

[17] 16 CFR 310.6(a)-(c).

[18] 16 CFR 310.6(d)-(f).

[19] 16 CFR 310.2(u) (pursuant to 15 U.S.C. 6106(4) (catalog sales)); 16 CFR 310.6(g) (business-to-business sales). In addition to these exemptions, certain entities including banks, credit unions, savings and loans, common carriers engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance regulated by state law are not covered by the Rule because they are specifically exempt from coverage under the FTC Act. 15 U.S.C. 45(a)(2); but see discussion below concerning the USA PATRIOT Act amendments to the Telemarketing Act. Finally, a number of entities, and individuals associated with them, that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from the Rule. 15 U.S.C. 6102(d)(2)(A); 6102(e)(1).

C. Rule Review and Request for Comment.

The Telemarketing Act required that the Commission initiate a Rule Review proceeding to evaluate the Rule's operation no later than five years after its effective date of December 31, 1995, and report the results of the review to Congress.[20] Accordingly, on November 24, 1999, the Commission commenced the mandatory review with publication of a Federal Register notice announcing that Commission staff would conduct a forum on January 11, 2000, limited to examination of issues related to the "do-not-call" provision of the Rule, and soliciting applications to participate in the forum.[21]

On February 28, 2000, the Commission published a second notice in the Federal Register, broadening the scope of the inquiry to encompass the effectiveness of all the Rule's provisions. This notice invited comments on the Rule as a whole and announced a second public forum to discuss the provisions of the Rule other than the "do-not-call" provision.[22] In response to this notice, the Commission received 92 comments from representatives of industry, law

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[20] 15 U.S.C. 6108.

[21] 64 FR 66124 (Nov. 24, 1999). Comments regarding the Rule's "do-not-call" provision, § 310.4(b)(1)(ii), as well as the other provisions of the Rule, were solicited in a later Federal Register notice on February 28, 2000. See 65 FR 10428 (Feb. 28, 2000). Seventeen associations, individual businesses, consumer groups, and law enforcement agencies were selected to engage in the forum's roundtable discussion ("Do-Not-Call" Forum), which was held on January 11, 2000, at the FTC offices in Washington, D.C. References to the "Do-Not-Call" Forum transcript are cited as "DNC Tr." followed by the appropriate page designation.

[22] 65 FR 10428 (Feb. 28, 2000) (the "February 28 Notice"). The Commission extended the comment period from April 27, 2000, to May 30, 2000. 65 FR 26161 (May 5, 2000).

enforcement, and consumer groups, as well as from individual consumers.[23]

The commenters generally praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud. Commenters consistently stressed that it is important to retain the Rule. However, commenters were less sanguine about the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the "do-not-call" provision and the provision restricting calling times. They also identified a number of areas of continuing or developing fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers alike. Commenters identified several changes in the marketplace that had occurred in the five years since the Rule was promulgated and that threatened the Rule's effectiveness. Those changes included increased consumer concern about personal

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[23] A list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the February 28 Notice is attached hereto as Appendix A. Appendix B is a list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the Notice of Proposed Rulemaking ("NPRM"), discussed below, including supplemental comments and comments submitted on the user fee proposal. References to comments are cited by the commenter's acronym followed by the appropriate page designation. "RR" after the commenter's acronym indicates that the comment was received in response to the Rule Review. "NPRM" after the commenter's acronym indicates that the comment was received in response to the NPRM. "Supp." after the commenter's acronym indicates that the comment was received as a Supplemental Comment. "User Fee" after the commenter's acronym indicates the comment was submitted in response to the request for comments on the Commission's user fee proposal.

privacy,[24] the development of novel payment methods,[25] and the increased use of preacquired account telemarketing [26] and upselling.[27]

Following the receipt of public comments, the Commission held a second forum on July 27 and 28, 2000 ("Rule Review Forum"), to discuss provisions of the Rule other than the "do-

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[24] The past several years have seen a greater public and governmental focus on the "do-not-call" issue. Related to the "do-not-call" issue is the proliferation of technologies, such as caller identification service, that assist consumers in managing incoming calls to their homes. Similarly, privacy advocates have raised concerns about technologies used by telemarketers (such as predictive dialers and deliberate blocking of caller identification information) that hinder consumers' attempts to screen calls or make requests to be placed on a "do-not-call" list.

[25] The growth of electronic commerce and payment systems technology has led, and likely will continue to lead, to new forms of payment and further changes in the way consumers pay for goods and services they purchase through telemarketing. In addition, billing and collection systems of telephone companies, utilities, and mortgage lenders are becoming increasingly available to a [wide variety of vendors of all types of goods and services. These newly available payment methods in many instances are relatively untested, and may not provide protections for consumers from unauthorized charges.

[26] The practice of preacquired account telemarketing—where a telemarketer acquires the customer'sbilling information prior to initiating a telemarketing call or transaction—has increasingly resulted in complaints from consumers about unauthorized charges. Billing information can be preacquired in a variety of ways, including from a consumer'sutility company, from the consumer in a previous transaction, or from another source. In many instances, the consumer is not involved in the transfer of the billing information and is unaware that the seller possesses it during the telemarketing call.

[27] The practice of "upselling" has also become more prevalent in telemarketing. Through this technique, customers are offered additional items for purchase after the completion of an initial sale. In the majority of upselling scenarios, the seller or telemarketer already has received the consumer's billing information, either from the consumer or from another source.

not-call" provision and to discuss the Rule's effectiveness.[28] Both the "Do-Not-Call" Forum and the Rule Review Forum were open to the public, and time was reserved to receive oral comments from members of the public in attendance. Both proceedings were transcribed and, along with the comments received, placed on the public record.[29]

Based on the record developed during the Rule Review, as well as the Commission's law enforcement experience, the Commission determined to retain the Rule but proposed to amend it to better address recurring abuses and to reach emerging problem areas.

D. The USA PATRIOT Act of 2001.

On October 25, 2001, the USA PATRIOT Act [30] became effective. This legislation contains provisions that have significant impact on the TSR. Specifically, § 1011 of that Act amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fundraising conducted by for-profit telemarketers on behalf of charitable organizations. Because enactment of the USA PATRIOT Act took place after the comment period for the Rule Review closed, the Commission did not raise issues relating to charitable fundraising by telemarketers in the Rule Review.

Section 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarket-

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[28] References to the Rule Review Forum transcript are cited as "RR Tr." followed by the appropriate page designation.

[29] Relevant portions of the entire record of the Rule Review proceeding, including all transcripts and comments, can be viewed on the FTC'swebsite at http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-202-326-2222.

[30] Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001).

ing Act, 15 U.S.C. § 6106(4), expanding it to cover any "plan, program, or campaign which is conducted to induce . . . a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call . . . ."

In addition, § 1011(b)(2), among other things, adds a new section to the Telemarketing Act directing the Commission to include new requirements in the "abusive telemarketing acts or practices" provisions of the TSR.[31] Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by specifying that "fraudulent charitable solicitation" is to be included as a deceptive practice under the TSR.

E. Notice of Proposed Rulemaking.

On January 30, 2002, the Commission published its NPRM, proposing revisions to the TSR ("proposed Rule") in order to ensure that consumers receive the protections that the Telemarketing Act mandated, and to effectuate § 1011 of the USA PATRIOT Act.[32] The Commission proposed a number of changes, including creating a national "do-not-call" registry maintained by the FTC, a ban on receiving from or disclosing to a third party a consumer's billing information, a prohibition against blocking caller identification information,

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[31] Specifically, § 1011(b)(2)(d) mandates that the TSR include in its regulation of abusive telemarketing acts and practices "a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made." Pub. L. 107-56 (Oct. 26, 2001).

[32] 67 FR 4492 (Jan. 30, 2002).

and a requirement that sellers or telemarketers accepting payment via novel payment methods obtain the customer's express verifiable authorization. During the course of this NPRM proceeding, the Commission received about 64,000 electronic and paper comments from representatives of industry, law enforcement, consumer and privacy groups, and from individual consumers.[33] On June 5, 6 and 7, 2002, the Commission held a forum ("June 2002 Forum") to discuss the issues raised by commenters regarding the FTC's proposed revisions.[34] The forum was open to the public, and time was reserved to receive oral comments from members of the public in attendance. During the forum, the Commission

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[33] Of these, more than forty-five were supplemental comments from organizations and individuals, and about 15,000 supplemental comments were from Gottschalks' customers submitted by Gottschalks. Simultaneous with, but separate from, the NPRM proceeding, the Commission has been exploring possible methods for implementing the proposed national "do-not-call" registry. On February 28, 2002, the Commission published a Request for Information ("RFI") that solicited information from potential contractors on various aspects of implementing the proposed registry. The RFI comment period closed on March 29, 2002. On August 2, 2002, the Commission issued a Request for Quotes to selected vendors. Final proposals were submitted on September 20, 2002, and are being evaluated by Commission staff. On May 29, 2002, the Commission published a Notice of Proposed Rulemaking, soliciting comments on a proposed amendment to the TSR that would establish the methods by which fees for use of the registry would be set. 67 FR 37362 (May 29, 2002). The comment period ended June 28, 2002. The proposed amendment received about forty comments (cited as "[Name of Commenter]-User Fee at [page number]"), virtually all of which argued that the Commission does not have the authority to issue a user fee, or that it was premature to propose a user fee because the Commission did not have sufficient information upon which to base the proposal. The user fee proposal remains under review as the Commission continues to evaluate the issues raised in the comments.

[34] References to the June 2002 Forum transcript are cited as "June 2002 Tr." followed by the appropriate day (I, II, or III, referring to June 5, 6, or 7, respectively) and page designation.

announced that it would accept supplemental comments until June 28, 2002.[35] The forum proceeding was transcribed and placed on the public record. The public record, including many comments and all forum transcripts, has been placed on the Commission's website on the Internet.[36]

Individual consumers generally favored the Commission's proposals, particularly with regard to a national "do-not-call" registry. Consumer groups and state law enforcement representatives also generally supported the proposed amendments, although they expressed concern about the effect of the proposal on state "do-not-call" and other laws. Business and industry commenters generally opposed the proposal, but suggested changes that they believed would make the proposed amendments less burdensome on legitimate business while still achieving the desired consumer protections. Comments from charitable organizations focused primarily on the FTC proposal which would require for-profit telemarketers who solicit on behalf of charitable organizations to comply with the proposed "do-not-call" registry. Charitable organizations consistently opposed such a requirement. The comments and the basis for the Commission's decision on the various recommendations are analyzed in detail in Section II below.

F. The Amended Rule.

The Commission has carefully reviewed the entire record developed in its rulemaking proceeding. The record, as well as the Commission's law enforcement experience, leave little

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[35] June 2002 Tr. II at 254. References to the supplemental comments received are cited as "[Name of Commenter]-Supp. at [page number]."

[36] Much of the record in this proceeding can be viewed on the FTC's website at http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-202-326-2222.

doubt that important changes have occurred in the marketplace, and that modifications to the original Rule are necessary if consumers are to receive the protections that Congress intended to provide when it enacted the Telemarketing Act. Based on that record and on the Commission's law enforcement experience, the Commission has modified the proposed Rule published in the NPRM and now promulgates this amended Rule, as described in this SBP.

The Commission's decision to retain certain provisions of the original Rule while supplementing or amending others is made pursuant to the Rule Review requirements of the Telemarketing Act,[37] and pursuant to the rulemaking authority granted to the Commission by that Act to protect consumers from deceptive and abusive practices,[38] including practices that may be coercive or abusive of the consumer's interest in protecting his or her privacy.[39] The Commission's decision to amend the original Rule also is made pursuant to the authority granted to the Commission by § 1011 of the USA PATRIOT Act.

As discussed in detail herein, the Commission believes that it is necessary to amend the original Rule to ensure that the Telemarketing Act's goals are met—that is, encouraging the growth of the legitimate telemarketing industry, while curtailing those practices that are abusive or deceptive. The record in this rulemaking proceeding demonstrates that many of the changes in the marketplace that have occurred since the original Rule was promulgated have led to the growth of deceptive and abusive practices in areas not adequately addressed by the original Rule. The amended Rule addresses these practices by responding to the changes in the marketplace in a manner consistent with the intent of

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[37] 15 U.S.C. 6108.

[38] 15 U.S.C. 6102(a)(1) and (a)(3).

[39] 15 U.S.C. 6102(a)(3)(A).

Congress in enacting the Telemarketing Act and § 1011 of the USA PATRIOT Act. The Commission believes that the amended Rule strikes a balance, maximizing consumer protections without imposing unnecessary burdens on the telemarketing industry. Each of the amendments is discussed in detail in this SBP. A summary of the major changes from the original Rule is set forth below. The amended Rule:

- Supplements the current company-specific "do-not-call" provision with a provision that will empower a consumer to stop calls from all companies within the FTC's jurisdiction by placing his or her telephone number on a central "do-not-call" registry maintained by the FTC, except when the consumer has an "established business relationship" with the seller on whose behalf the call is made;

- Permits consumers who have put their numbers on the national "do-not-call" registry to provide permission to call to any specific seller by an express written agreement;

- Explicitly exempts solicitations to induce charitable contributions via outbound telephone calls from coverage under the national "do-not-call" registry provision;

- Modifies § 310.3(a)(3) to require express verifiable authorization for all transactions except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E;

- Modifies § 310.3(a)(3)(iii), the provision allowing a telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the consumer prior to submitting the consumer's billing information for payment;

• Mandates disclosures in the sale of credit card loss protection, and prohibits misrepresenting that a consumer needs offered goods or services in order to receive protections he or she already has under 15 U.S.C. § 1643 (limiting a cardholder's liability for unauthorized charges on a credit card account);

• Explicitly mandates that all required disclosures in § 310.3(a)(1) and § 310.4(d) be made truthfully;

• Expands upon the current prize promotion disclosures to include a statement that any purchase or payment will not increase a consumer's chances of winning;

• Prohibits disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing, except when the disclosure or receipt is to process a payment for goods or services or a charitable contribution pursuant to a transaction;

• Prohibits causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor;

• Sets out guidelines for what evidences express informed consent in transactions involving preacquired account information and "free-to-pay conversion" features;

• Requires telemarketers to transmit the telephone number, and name, when available, of the telemarketer to any caller identification service;

• Prohibits telemarketers from abandoning any outbound telephone call, and provides, in a safe harbor provision, that to avoid liability under this provision, a telemarketer must: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales

representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;

• Extends the applicability of most provisions of the Rule to "upselling" transactions;

• Prohibits denying or interfering in any way with a consumer's right to be placed on a "do-not-call" list;

• Requires maintenance of records of express informed consent and express agreement;

• Narrows certain exemptions of the Rule;

• Clarifies that facsimile transmissions, electronic mail, and other similar methods of delivery are direct mail for purposes of the direct mail exemption; and

• Modifies various provisions throughout the Rule to effectuate expansion of the Rule's coverage to include charitable solicitations, pursuant to Section 1011 of the USA PATRIOT Act, and adds new mandatory disclosures and prohibited misrepresentations in charitable solicitations.

G. Proposed Rule Adopted with Some Modifications.

Based on the entire record in this proceeding, the amended Rule adopted by the Commission is substantially similar to the proposed Rule. However, the amended Rule contains some important differences from the proposed Rule. These further modifications to the original Rule were based on the recommendations of commenters and on the Commission's more comprehensive law enforcement experience in certain areas over the months since publishing the NPRM.

The major differences between the proposed Rule and the amended Rule adopted here are as follows:

• The definition of "charitable contribution" no longer contains exceptions for religious and political groups;

• Sellers who have an "established business relationship" with the consumer are exempted from the national "do-not-call" registry;

• For-profit telemarketers who solicit charitable contributions are exempted from the national "do-not-call" registry, but remain subject to the entity-specific "do-not-call" provision;

• The original Rule's definition of "outbound call" has been reinstated, and the proposed Rule modified to require specific disclosures in an upsell transaction;

• Disclosures regarding negative option features are required;

• Express verifiable authorization is required for all payments, except those made by a credit or debit card subject to certain statutorily-mandated consumer protections;

• For express oral authorization to be deemed verifiable, a seller must ensure the customer's or donor's receipt of the date the charge will be submitted for payment (rather than the date of the payment) and identify the account to be charged with sufficient specificity such that the customer or donor understands what account is being used to collect payment (rather than provide the account name and number);

• The use of written post-sale confirmations is permitted, subject to the requirement that such confirmations be clearly and conspicuously labeled as such; however, this method is not permitted in transactions involving a "free-to-pay conversion" feature and preacquired account information;

• In charitable solicitations, the prohibited misrepresentation regarding the percentage or amount of any charitable contribution that will go to a charitable organization or program is no longer delimited by the phrase "after any administrative or fundraising expenses are deducted;"

• The Rule now specifies that billing charges to a consumer's account without the consumer's authorization is an abusive practice and a Rule violation; and the Rule now requires that a customer's express informed consent be provided in every transaction;

• The ban on the transfer of consumers' billing information has been replaced with a ban on transferring unencrypted consumer account numbers;

• The failure to transmit caller identification information is prohibited, rather than the affirmative blocking of such information;

• Abandoned calls are prohibited, subject to a "safe harbor" that requires a telemarketer to: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;

• Records of express informed consent or express agreement must be maintained;

• The exemptions for certain kinds of calls are explicitly unavailable to upselling transactions;

• The exemption for business-to-business telemarketing is once again available to telemarketing of

> Web services and Internet services, as well as the solicitation of charitable contributions.

II. Discussion of the Amended Rule

The amendments to the Rule do not alter § 310.7 (Actions by States and Private Persons), or § 310.8 (Severability), although § 310.8 (Severability) has been renumbered as § 310.9 in the amended Rule. Section 310.8 of the amended Rule is now reserved.

A. Section 310.1—Scope of Regulations.

Section 310.1 of the amended Rule states that "this part [of the CFR] implements the [Telemarketing Act], as amended," reflecting the amendment of the Telemarketing Act by § 1011 of the USA PATRIOT Act.[40] This section discusses comments received regarding the implementation of the USA PATRIOT Act amendments as well as other issues relating to the scope of coverage of the TSR.

Effect of the USA PATRIOT Act.

As noted in the NPRM, § 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. § 6306(4), by inserting the underscored language:

> The term 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services *or a charitable contribution, donation, or gift of money or any other thing of value* by use of one or more telephones and which involv[illegible] more than one interstate telephone call. . . .

In addition, § 1011(b)(2) adds a new section to the Telemarketing Act requiring the Commission to include in

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[40] 15 U.S.C. 6101-6108. The Telemarketing Act was amended by the USA PATRIOT Act on October 25, 2001. Pub. L. 107-56 (Oct. 26, 2001).

the "abusive telemarketing acts or practices" provisions of the TSR:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by inserting the underscored language:

> The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices *which shall include fraudulent charitable solicitations* and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

Notwithstanding the amendment of these provisions of the Telemarketing Act, neither the text of § 1011 nor its legislative history suggests that it amends § 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR. Section 6105(a) of the Act states:

> Except as otherwise provided in sections 6102(d) [with respect to the Securities and Exchange Commission], 6102(e) [Commodity Futures Trading Commission], 6103 [state Attorney General actions], and 6104 [private consumer actions] of this title, this chapter shall be enforced by the Commission under the Federal Trade

> Commission Act (15 U.S.C. § 41 *et seq.*). *Consequently, no activity which is outside of the jurisdiction of that Act shall be affected by this chapter. (emphasis added).*[41]

One type of "activity which is outside the jurisdiction" of the FTC Act, as interpreted by the Commission and federal court decisions, is that conducted by non-profit entities. Sections 4 and 5 of the FTC Act, by their terms, provide the Commission with jurisdiction only over persons, partnerships, or "corporations organized to carry on business for their own profit or that of their members." [42]

Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act

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[41] Section 6105(b) reinforces the point made in § 6105(a), as follows:

> "The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and *with the same jurisdiction*, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. § 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the same privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and *with the same jurisdiction*, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter." (emphasis added).

[42] Section 5(a)(2) of the FTC Act states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4 of the Act defines "corporation" to include: "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members* . . . ." 15 U.S.C. 44 (emphasis added).

compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.[43] The USA PATRIOT Act brings the Telemarketing Act's jurisdiction over charitable solicitations in line with the jurisdiction of the Commission under the FTC Act by expanding the Rule's coverage to include not only the sale of goods or services, but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.

The Commission received numerous comments regarding the change in scope to the TSR required by the USA PATRIOT Act amendments of the Telemarketing Act. Some comments supported the Commission's interpretation of the USA PATRIOT Act amendments, and the coverage of for-profit telemarketers who solicit on behalf of exempt charitable organizations.[44] However, the majority of

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[43] A fundamental tenet of statutory construction is that "a statute should be read as a whole, . . . [and that] provisions introduced by the amendatory act should be read together with the provisions of the original section that were . . . left unchanged . . . as if they had been originally enacted as one section." 1A NORMAN J. SINGER, SUTHERLAND STATUTES & STAT. CONSTR. § 22:34 (6th ed. 2002), *citing, inter alia, Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); *Am. Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196 (2d Cir. 1974); *Kirchner v. Kansas Tpk. Auth.*, 336 F.2d 222 (10th Cir. 1964); *Nat'l Ctr. for Preservation Law v. Landrieu*, 496 F. Supp. 716 (D.S.C. 1980); *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986); *Palardy v. Horner*, 711 F. Supp. 667 (D. Mass. 1989). Thus, in construing a statute and its amendments, "[e]ffect is to be given to each part, and they are to be int erpreted so that they do not conflict." *Id.*

[44] *See, e.g.*, AARP-NPRM at 4; AFP-NPRM at 3 (arguing that the USA PATRIOT Act gives the FTC jurisdiction over for-profit telemarketers soliciting on behalf of non-profits, agreeing that the disclosures required by amended Rule § 310.4(e) are necessary, and noting that the disclosures mirror the disclosures required by AFP's code of ethics); ASTA-NPRM at 1; Make-a-Wish-NPRM, *passim*; MBNA-NPRM at 6 (the Rule

commenters who addressed this issue believed the Commission had misinterpreted the mandate of the USA PATRIOT Act amendments. Law enforcement agencies and consumer groups, including NAAG and NASCO, generally expressed the view that the Commission had underestimated the jurisdictional powers conferred on it by the USA PATRIOT Act amendments, and urged that the Rule apply not only to for-profit solicitors who call on behalf of charities, but also to the charities themselves.[45] These commenters argued that the language of the USA PATRIOT Act and its legislative history do not support limiting the applicability of the TSR to telemarketers who call on behalf of non-profits, rather than extending it to cover charitable organizations as well.[46]

On the other hand, most non-profit organizations that commented argued that the Commission's interpretation of the USA PATRIOT Act amendments was too expansive. Several of these commenters argued that in adopting § 1011 of the USA PATRIOT Act, "Congress meant only to apply certain disclosure requirements—and not the other aspects of the Rule—to professional fundraisers for charities and to for-profit entities soliciting charitable contributions for their own philanthropic purposes."[47] Others suggested that "Congress

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amendments to effectuate the USA PATRIOT Act's provisions "reflect Congress' intent and are limited in scope and impact while providing important consumer benefits.").

[45] *See, e.g.*, NAAG-NPRM at 50-51; NASCO-NPRM at 3-4.

[46] *See* NAAG-NPRM at 50-51; NASCO-NPRM at 3-4 (the USA PATRIOT Act refers to "fraudulent charitable solicitations," and requires disclosures by "any person" engaged in telemarketing; also noting that the USA PATRIOT Act was passed in the wake of September 11, 2001, and in response to misrepresentations by non-profits as well as their for-profit telemarketers.).

[47] DMA-NonProfit-NPRM at 4. *See also* ACE-NPRM at 1-2; ERA-NPRM at 45; IUPA-NPRM at 21-22.

intended only to address bogus charitable solicitation where the non-profit or charitable cause or organizational scheme itself is of a criminal or fraudulent nature."[48] These commenters cite statements made by the legislation's chief sponsor to the effect that concerns about fraudulent charities prompted him to introduce the legislation.[49]

The Commission believes that concerns about bogus charitable fundraising in the wake of the events of September 11, 2001, in large measure propelled passage of § 1011 of the USA PATRIOT Act.[50] But the fact remains that Congress did more than impose upon the solicitation of charitable contributions by for-profit telemarketers prohibittions against misrepresentation and basic disclosure obligations. Indeed, the USA PATRIOT Act amendments alter the scope of the entire TSR by altering the key definition of the statute—"telemarketing"—to encompass charitable solicitation. Moreover, the text of § 1011 expressly directs the Commission to address both deceptive and abusive acts or

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[48] Not-For-Profit Coalition-NPRM at 26. *See also* Community Safety-NPRM at 2.

[49] *See* Not-For-Profit Coalition-NPRM at 27-28; DMA-NonProfit-NPRM at 5.

[50] *See* letter dated June 14, 2002, from Senator Mitch McConnell to FTC Chairman Timothy Muris, commenting on the NPRM and stating:

> "In an effort to protect generous citizens and the charitable institutions they support, I was proud to introduce the Crimes Against Charitable Americans Act and secure its inclusion in the USA PATRIOT Act. This legislation strengthens federal laws regulating charitable phone solicitations. The bill also takes important steps to combat deceptive charitable solicitations by requiring telemarketers to make common sense disclosures such as the charity's identity and address at the beginning of the phone call. . . . When Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal "do-not-call" list, and certainly not a list that applied to charitable organizations or their authorized agents."

practices.[51] Thus, there is no textual support for the notion that § 1011 excludes from its grant of authority over charitable solicitations the power to prohibit deceptive or abusive practices.[52]

Some non-profit commenters also argued that the Commission's interpretation of the USA PATRIOT Act produced, in effect, a double standard, regulating charities who outsource their telemarketing, but not those who conduct their own telemarketing campaigns.[53] Others opined that this bifurcated regulatory scheme was not intended by Congress when it passed the USA PATRIOT Act amendments to the Telemarketing Act.[54] These commenters argued that this distinction penalizes charities (by subjecting them to regulation) merely because they choose to outsource an administrative function. Some argued further that the increased costs of regulatory compliance will not be borne by the for-profit telemarketers, but rather by charities themselves, negatively impacting their ability to carry out their primary mission.[55]

Again, the Commission notes that despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make

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[51] Pub. L. 107-56 (Oct. 26, 2001).

[52] It is a tenet of statutory construction that "an amendatory act is not to be construed to change the original act . . . further than expressly declared or necessarily implied." SUTHERLAND STAT. CONSTR., note 43 above, at § 22:30 (citations omitted). The Commission believes the necessary implication of modifying the definition of "telemarketing" in the USA PATRIOT Act is to have all provisions of the Rule apply to charitable solicitations.

[53] *See, e.g.*, March of Dimes NPRM at 2.

[54] *See* IUPA-NPRM at 1.

[55] *See* Reese-NPRM at 2.

direct regulation of non-profit organizations possible. Nevertheless, reading the amendatory act together with the original language, as it must, the Commission has sought to give full effect to the directive of Congress set forth in the USA PATRIOT Act amendments.

Another argument raised by large numbers of non-profit commenters is that regulating for-profit telemarketers who solicit on behalf of non-profits, and in particular subjecting them to the requirements of the "do-not-call" registry provision, is unfair given the other limitations on the Commission's jurisdiction.[56] These commenters suggested that the result of this scheme would be to allow commercial calls that consumers find intrusive, while banning calls from charities, even those with whom a donor has a past relationship.[57] As explained in greater detail in the discussion of the applicability of the "do-not-call" provisions to charitable solicitation telemarketing, careful consideration of this argument has led the Commission to exempt solicitations to induce charitable contributions via outbound telephone calls from the "do-not-call" registry provision. Only the less restrictive entity-specific "do-not-call" provision included in the original Rule will apply to charitable solicitation telemarketing. However, both the entity-specific "do-not-call" provisions and the "do-not-call" registry provisions apply to commercial telemarketing to induce purchases of goods or services. This approach fulfills the Commission's intention that the TSR be consistent with First Amendment principles, whereby a higher degree of protection is extended to charitable solicitation than to commercial solicitation.

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[56] *See, e.g.*, FOP-NPRM at 2; HRC-NPRM at 1; Italian American Police-NPRM at 1; Lautman-NPRM at 2; Leukemia Society-NPRM at 1-2; NCLF-NPRM at 1; Angel Food-NPRM at 1; North Carolina FFA-NPRM at 1; SO-CT-NPRM at 1; SO-NJ-NPRM at 1; SO-WA-NPRM at 1; Reese-NPRM at 2; SHARE-NPRM at 3; Stage Door-NPRM at 1.

[57] *See, e.g.*, PAF-NPRM at 1; AOP-Supp. at 1; Chesapeake-Supp. at 1.

Moreover, as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions.

Commenters' Proposals.

Noting the Commission's jurisdictional limitations with respect to banks, MBNA requested that the Rule explicitly state that it is "inapplicable to entities exempt from coverage under § 5(a)(2) of the [FTC Act]."[58] MBNA also recommended that the Rule extend this exemption to "entities acting on behalf of banks . . . because such entities are regulated by the Bank Service Company Act, 15 U.S.C. § 45(a)(2), concerning services they provide for banks."[59] MasterCard challenged the Commission's statement that it can regulate third-party telemarketers who call on behalf of a bank, and urged that the Commission explicitly exempt "any bank subsidiary or affiliate performing services on behalf of a bank.[60] ABA recommended that the amended Rule clarify that "non-bank operating subsidiaries of banks as defined by the banking agencies" are exempt.[61]

The Commission notes that, from the inception of the Rule, the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act, and thus, for example, "a nonbank company that contracts with a bank to provide telemarketing services on behalf of the bank is covered" by this Rule.[62] This reading is

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[58] MBNA-NPRM at 2. *Accord* Fleet-NPRM at 2 (arguing that the Office of the Comptroller of the Currency already provides significant guidance to banks on managing risks that may arise from their business relationships with third parties); AFSA-NPRM at 3.

[59] MBNA-NPRM at 2. *See also* AFSA-NPRM at 3.

[60] MasterCard-NPRM at 13-14. *Accord* Citigroup-NPRM at 11.

[61] ABA-NPRM at 3.

[62] 60 FR at 43843, *citing, inter alia Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980) (holding that the air carrier exemption from

consistent with the Commission's long-standing interpretation of the scope of its authority under the FTC Act, as well as with judicial precedent.[63] Furthermore, the Commission's authority was clarified in § 133 of the Gramm-Leach-Bliley Act ("GLBA"), which states that "[a]ny person that . . . is controlled directly or indirectly . . . by . . . any bank . . . ([as] defined in section 3 of the Federal Deposit Insurance Act) *and is not itself a bank . . . shall not be deemed to be a bank . . . for purposes of any provisions applied by*" the FTC under the FTC Act.[64] Most recently, a federal district court held that, under this language, the Rule applies to telemarketing by a mortgage subsidiary of a national bank. As the court stated, "the definition of 'bank' identified by Congress simply does not include the subsidiaries of banks."[65]

The Commission believes it is unnecessary to state in the Rule what is already plain in the Telemarketing Act, *i.e.*, that its jurisdiction for purposes of the TSR is conterminous with its jurisdiction under the FTC Act, and therefore declines to include an express statement of this fact in the Rule. Further, the Commission declines to adopt the interpretation of some commenters that the FTC Act itself exempts non-bank entities

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the FTC Act did not apply to a firm publishing schedules and fares for air carriers, which was not itself an air carrier); FTC/Direct Mktg. Ass'n., *Complying with the Telemarketing Sales Rule* (Apr. 1996) ("TSR Compliance Guide") at 7.

[63] *See, e.g., Official Airline Guides*, note 62 above; *FTC v. Saja*, 1997-2 CCH (Trade Cas.) P 71,952 (D. Ariz. 1997); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080 (1994).

[64] GLBA, Pub. L. 106-102, 113 Stat. 1383, Title I, § 133(a), 15 U.S.C. 6801-6810 (2001).

[65] *Minnesota v. Fleet Mortgage Co rp.*, 181 F. Supp. 2d 995 (D. Minn. 2001) (noting that the applicable definition under the Federal Deposit Insurance Act ("FDIA") is "any national bank, State bank, District Bank, and any Federal branch and insured branch" *citing* FDIA, 12 U.S.C. 1813(a)(1)(A)).

based on their affiliation with or provision of services to exempt banks, and the recommendations of those commenters who sought an exemption from the Rule for bank subsidiaries or agents. To do so would be contrary to the Commission's interpretation of its jurisdictional boundaries, and would unnecessarily limit the reach of the Rule.[66]

In a similar argument, SBC asserted that, contrary to the Commission's stated position, the Commission's lack of jurisdiction over common carriers engaged in common carriage activity extends to their affiliates and their agents engaged in telemarketing on their behalf.[67] SBC cites no authority for this proposition, and the Commission is aware of none. SBC claims that the cases cited by the Commission in the NPRM [68] in support of its authority provide no support for Commission jurisdiction over a common carrier's agent assisting in selling common carrier services.[69] In fact, in one of those cases, the publisher of what the court described as "the primary market tool of . . . virtually every (air) carrier . . . in the United States" was held not to be exempt under the exemption for air carriers.[70] Accordingly, the Commission declines to revise its position.

Citigroup requested that the amended Rule clarify that certain financial services providers, such as insurance underwriters and registered broker-dealers, are exempt from

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[66] This approach is consistent with that laid out in the SBP of the original Rule. *See* 60 FR at 43483.

[67] SBC-NPRM at 2, 4-5.

[68] 67 FR at 4407 (*citing* 60 FR at 43843, *citing FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) and *Official Airline Guides*), *see* note 62 above.

[69] SBC-NPRM at 4-5.

[70] *Official Airline Guides, see* note 62 above. *See also* cases cited above in note 63, rejecting exemption claims of telemarketers for exempt organizations.

the Rule.[71] NAIFA requested similar clarification regarding insurance companies, as well as an explicit statement of exemption in the Rule.[72] The Commission believes that the explicit statement of the Commission's jurisdictional limitation over broker-dealers is abundantly clear in the Telemarketing Act itself; [73] thus, it is unnecessary to exempt them in the Rule. Similarly, the Commission believes its jurisdictional limitations regarding the business of insurance are clear, and thus no express exemption for these entities is necessary.[74]

In contrast to these requests to circumscribe or restate the Commission's jurisdiction under the Rule, a number of commenters urged the expansion of the Rule's scope beyond its current boundaries. As NCL put it, "[b]ecause the Commission's general jurisdiction does not include significant segments of the telemarketing industry, such as common carriers and financial institutions, the Rule does not provide comprehensive protection for consumers or a level playing field for marketers." [75] Others argued that the Commission should assert jurisdiction over intrastate calls as well as interstate calls.[76]

As the Commission stated in the NPRM, "the jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits." [77]

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[71] *See* Citigroup-NPRM at 10.

[72] *See* NAIFA-NPRM at 1-2.

[73] 15 U.S.C. 6102(d)(2).

[74] See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (the business of insurance, to the extent that it is regulated by state law, is exempt from the Commission's jurisdiction pursuant to the FTC Act).

[75] NCL-NPRM at 2. *See also* Horick-NPRM at 1; PRC-NPRM at 3-4; Myrick-NPRM at 1.

[76] FCA-NPRM at 2.

[77] 67 FR at 4497.

Thus, absent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.[78] Therefore, when an exempt financial institution, telephone company, or non-profit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR.[79]

Regarding the suggestion that the Commission regulate intrastate telemarketing calls, the Commission notes that, pursuant to the definition of "telemarketing" included in the Telemarketing Act, 15 U.S.C. § 6106(4), the Commission only has authority to regulate "a plan, program, or campaign which is conducted . . . by use of one or more telephones and which involves *more than one interstate call*." (emphasis added).

Finally, one commenter suggested that the Commission expressly state its jurisdiction over prerecorded telephone solicitations and facsimile advertisements.[80] The Commission

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[78] *Id.*

[79] As the Commission stated when it promulgated the Rule, "[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well." 60 FR at 43843. Although some commenters, such as SBC (SBC-NPRM at 5-8) and Wells Fargo (Wells Fargo-NPRM at 2), took issue with this proposition, the fact remains that the Telemarketing Act states merely that "no activity which is outside the jurisdiction of that Act shall be affected by this chapter." 15 U.S.C. 6105(a). Thus, when an entity not exempt from the FTC Act engages in telemarketing, that conduct falls within the Commission's jurisdiction under the TSR. *Id.*; TSR Compliance Guide at 12.

[80] *See* Worsham-NPRM at 6.

believes that sales calls using pre-recorded messages may fall within the Rule's definition of "telemarketing," provided the call is not exempt and provided the call meets the other criteria of "telemarketing." Thus, a sales call using a prerecorded message may be "tele-marketing" if it is part of a plan, program, or campaign for the purpose of inducing the purchase of goods or services or inducing a donation to a charitable organization, is conducted by use of one or more telephones, and involves more than one interstate call. However, the fact that prerecorded sales calls may be "telemarketing" does not affect the fact that such calls are already prohibited, except with the consumer's prior express consent, under regulations promulgated by the FCC pursuant to the TCPA.[81] Similarly, FCC regulations already prohibit unsolicited facsimile advertisements,[82] although facsimiles also are a form of direct mail subject to the TSR. The Commission notes in the discussion of § 310.6(b)(6) below that it considers facsimiles to be a form of direct mail solicitation. Thus, under § 310.6(b)(6), a seller using a facsimile advertisement to induce calls from consumers may not claim the direct mail exemption unless the facsimile truthfully discloses the material information listed in § 310.3(a)(1) (or contains no material misrepresent-ation regarding any item contained in § 310.3(d) if the solicitation is for a charitable contribution).

B. Section 310.2—Definitions.

The amended Rule retains the following definitions from the original Rule unchanged, apart from renumbering: "acquirer," "Attorney General," "cardholder," "Commission," "credit," "credit card," "credit card sales draft," "credit card

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[81] 47 CFR 64.1200(a)(2).

[82] 47 CFR 64.1200(a)(3).

system," "customer," [83] "investment opportunity," [84] "merchant," "merchant agreement," "person," "prize," "prize promotion," "seller," and "State."

Based on the record developed in this matter, the Commission has determined to retain the following definitions from the proposed Rule unchanged, apart from renumbering: "caller identification service," "donor," "telemarketer," [85] and "telemarketing." The amended Rule

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[83] VISA stated that the definition of "customer" is too broad, encompassing not only "the person who is party to the telemarketing call and who would be liable for the amount of a purchase as the contracting party, but also would include any person who is liable under the terms of the payment device." VISA-NPRM at 7. Although the term "customer," defined to mean "any person who is or may be required to pay for goods or services offered through telemarketing," is broad in scope, the Commission believes this breadth is necessary to effect the purposes of the Rule. Further, the Commission believes that the term "customer," taken in context of the various Rule sections in which it is used, is not confusing. Therefore, the Commission makes no change in the amended Rule to the definition of "customer."

[84] One commenter recommended that the Commission clarify that an investment vehicle whose main attribute is that it provides tax benefits would be considered an "investment opportunity" under the Rule. Thayer-NPRM at 6. The Commission believes that such a tax-advantaged investment would come under the present definition, which is predicated on representations about "past, present, or future income, profit, or appreciation." The Commission believes that any such investment opportunity would only result in a tax advantage because of its ability to produce income or appreciation, regardless of whether that income is positive (and tax-deferred or tax-exempt) or negative (resulting in deductible losses). Thus, the Commission has retained the original definition of "investment opportunity" in the amended Rule.

[85] One commenter expressed concern that "a company that sells telemarketing services to sellers, but does not maintain any calling facilities itself, instead subcontracting the actual telephoning to individuals" might not fall within the definition of "telemarketer." Patrick-NPRM at 2. The Commission disagrees, and believes that regardless of whether an entity maintains a physical call center, it would

modifies the definitions put forth in the NPRM for the terms "billing information," "charitable contribution," "material," and "outbound telephone call." Finally, the amended Rule adds five definitions that were not included in the NPRM proposal. They are: "established business relationship," "free-to-pay conversion," "negative option feature," "preacquired account information," and "upselling." The Commission discusses each of these definitions below, along with the comments received regarding them, and the Commission's reasoning in making a final determination regarding each of these definitions.[86]

§ 310.2(c) —Billing information

The proposed Rule included a definition of the term "billing information," which was used in proposed § 310.3(a)(3), the express verifiable authorization provision, and proposed § 310.4(a)(5), the section that addressed preacquired account telemarketing. Under the definition proposed in the NPRM, the term "billing information" encompassed "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, or similar account, utility bill, mortgage loan account, or debit card." [87]

The Commission received numerous comments regarding this definition as it pertained to the express verifiable authorization and preacquired account provisions of the proposed Rule. The use of the term in the express verifiable

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be a "telemarketer" for purposes of the Rule if "in connection with telemarketing, [it] initiates or receives telephone calls to or from a customer or donor." Amended Rule § 310.2(bb).

[86] The definitions proposed in the NPRM for "express verifiable authorization," "Internet services," and "Web services" have been deleted from the amended Rule because they are no longer necessary in light of certain substantive modifications in the amended Rule.

[87] *See* proposed Rule § 310.2(c), and discussion, 67 FR at 4498-99.

authorization provision drew less comment, perhaps because that provision merely required that the customer or donor receive such billing information if express verifiable authorization of payment is to be deemed verifiable.[88] Comments from consumer groups generally favored the "billing information" definition, noting that the breadth of the term would prove beneficial to consumers.[89] AARP, for example, stated that the definition, as employed in the proposed preacquired account telemarketing provision, "is broad enough so as not to leave any doubt in the mind of the telemarketer regarding what can and cannot be shared."[90] Law enforcement representatives and some consumer groups expressed their concern that, as broad as the definition might seem, it should be further expanded to encompass encrypted data, and other kinds of information that can allow access to a consumer's account.[91] Industry commenters, on the other

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[88] As discussed below, in the section explaining the express verifiable authorization provision (i.e., § 310.3(a)(3)), commenters' concerns regarding billing information in the express verifiable authorization provision focused on the dangers of disclosure of consumers' account numbers.

[89] *See* NCLC-NPRM at 13; LSAP-NPRM at 5 (approved of definition, but also suggested changing "such as" to "including but not limited to").

[90] AARP-NPRM at 7.

[91] Specifically, NAAG noted: "[T]he Gramm Leach Bliley Act ("GLBA") has resulted in the common use of reference numbers and encrypted numbers to identify consumer accounts in preacquired account telemarketing. These types of account access devices definitely should be included in the list of examples. Failure to include encrypted numbers within the scope of the Rule's definition of 'billing information' would render the Rule useless as a device to combat the ills of preacquired account telemarketing." NAAG-NPRM at 38. *See also* NACAA-NPRM at 5-6 ("consider providing a non-exclusive list of such information, based upon technologies in place today. Thus, name, account number, telephone number, married and maiden names of parents, social security number, passwords to accounts and PINs, and encrypted versions of this information, with or without the encryption [key], should all be prohibited

hand, argued precisely the opposite, requesting that the definition be narrowed and that it specifically exclude encrypted data,[92] or other specified items unique to that commenter's business practices.[93] Instead, industry commenters recommended, "billing information" should be limited to account information that "in and of itself, is sufficient to effect a transaction" against a consumer's account.[94] Virtually all of these comments were made in the

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from use in any trasaction but the immediate one in which the consumer is engaged."); NCLC-NPRM at 13.

[92] Citigroup-NPRM at 7-8; Household Auto-NPRM at 2 ("Although the specific language of the proposed definition does appear to be consistent with the Commission's GLBA interpretation, the explanation of the term in the [NPRM] is broader and creates a conflict with the GLBA interpretation . . . . To avoid such a conflict, we suggest that the Commission clarify that the term . . . includes only account numbers and specifically excludes encrypted account numbers."). *Accord* ABIA-NPRM at 2; Roundtable-NPRM at 8 ("The Roundtable is concerned that this definition is so broad that it could be construed to restrict the sharing of publicly available identifying information, such as a consumer's name, phone number and address."). *See also* AFSA-NPRM at 11-12; Advanta-NPRM at 3; ARDA-NPRM at 3; Assurant-NPRM at 3; Capital One-NPRM at 8-9; Cendant-NPRM at 7; Citigroup-NPRM at 7; E-Commerce Coalition-NPRM at 2; ERA-NPRM at 24; IBM-NPRM at 10; MPA-NPRM at 23, n.23; MasterCard-NPRM at 8; Metris-NPRM at 7; VISA-NPRM at 6.

[93] *See, e.g.*, Green Mountain-NPRM at 31 ("If the Commission intends to adopt its proposal to amend the TSR to add a new Section 310.4(a)(5) to ban the use of preacquired billing information obtained from third parties, it should exempt names, addresses, electricity meter identifiers, and electricity usage patterns from its definition of 'billing information.'")

[94] IBM-NPRM at 10. ARDA argued that information that would fall within the definition of "billing information"—such as a customer's or donor's date of birth—may be collected during a call for purposes other than to effect a charge. ARDA cited examples including "eligibility to enter a contest or drawing" or "demographic purposes." ARDA-NPRM at 3. ARDA then asserted that, while this information may not be gathered during a call in which a billing occurs, or used for billing purposes in the first instance, it could be passed along to other parties for marketing or

context of the proposed Rule provision regarding preacquired account telemarketing, which would have prohibited the disclosure or receipt of "billing information" except when provided by the customer or donor to process payment.

As noted below in the discussions of amended Rule §§ 310.4(a)(5) and (6), the Commission has tailored its approach to preacquired account telemarketing, thereby addressing many of the concerns raised by commenters on both sides regarding the proposed definition of "billing information." The amended Rule's approach to preacquired account telemarketing—which no longer focuses on the sharing of "billing information" in anticipation of telemarketing, but instead prohibits "[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor"—obviates the concerns about the breadth of the term, and whether it includes or excludes encrypted account numbers.[95]

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other purposes. Id. While the Commission recognizes that information like date of birth has marketing uses beyond access to consumer accounts for billing purposes, the Commission finds it improbable at best that collection or confirmation of date of birth, or similar piece of information, as a proxy for consent to be charged for a purchase or donation would satisfy the "express informed consent" requirements of amended Rule § 310.4(a)(6), discussed below.

[95] During the Rule Review, industry argued the term was so broad it might mean that sellers and telemarketers could not share customer names and telephone numbers for use in telemarketing. *See, e.g.*, Advanta-NPRM at 3; Roundtable-NPRM at 8. Industry also argued that encrypted data should not be included in the definition of "billing information," because such data by itself does not allow a charge to be placed on a consumer's [account, and because sharing it is permitted by the GLBA. *See, e.g.*, Cendant-NPRM at 7; E-Commerce Coalition-NPRM at 2; MPA at 23, n.23. These arguments have been addressed by the Commission's revised approach to preacquired account telemarketing, which focuses not on the sharing of account information—except in the very limited area of sale of unencrypted account numbers—but on the harm that results from certain practices in preacquired account telemarketing, i.e., unauthorized

However, the amended Rule includes a definition of "preacquired account information," which encompasses both encrypted and unencrypted account information, to address specifically the practice of preacquired account telemarketing.[96]

Consequently, after consideration of the record in this proceeding, and in light of the more focused approach to the provisions in which the term is used, the Commission has decided to retain the proposed definition of "billing information," with a minor modification. The definition now encompasses "any data that enables any person to obtain access to a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card." (emphasis added). The Commission believes that this syntactical modification, substituting the phrase "that enables any person to obtain access" for the phrase "that provides access," makes the definition more precise and somewhat easier to understand. The definition retains the broad scope of its predecessor in order to capture the myriad ways a charge may be placed against a consumer's account,[97] yet has more limited effect in the context of the approach adopted in the amended Rule to address preacquired account telemarketing and express verifiable authorization.

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charges. Moreover, in those instances where there has been the strongest history of abuse, sellers and telemarketers are required to obtain part or all of the customer's account number directly from the customer.

[96] *See* amended Rule § 310.2(w), and related discussion below.

[97] The record shows that a telemarketer or seller may provide anything from complete account number to mother's maiden name to initiate a charge for a telemarketing transaction, depending on its relationship with another seller, financial institution, or billing entity. *See, e.g.*, Assurant-NPRM at 4.

§ 310.2(d) —Caller identification service

The definition of "caller identification service" comes into play in § 310.4(a)(7) of the amended Rule, discussed below. In the NPRM, the Commission proposed to define "caller identification service" to mean "a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone." As the Commission explained in the NPRM, the Commission intends the definition of "caller identification service" to be sufficiently broad to encompass any existing or emerging technology that provides for the transmission of calling party information during the course of a telephone call.[98] Those few commenters who addressed the definition supported the Commission's proposal.[99] Therefore, the amended Rule adopts § 310.2(d), the definition of "caller identification service," unchanged from the proposal.

§ 310.2(e) —Charitable contribution

The original Rule did not include a definition of "charitable contribution" because originally the term "telemarketing" in the Telemarketing Act, which determined the scope of the TSR, was defined to reach telephone solicitations only for the purpose of inducing sales of goods or services.[100] The proposed Rule added a definition of the term "charitable

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[98] 67 FR at 4499.

[99] *See, e.g.*, EPIC-NPRM at 11; ARDA-NPRM at 4. ARDA suggested that the definition be expanded to allow transmission of the name and number of "any party whom the telephone subscriber may contact" regarding being placed on the company's "do-not-call" list. As noted in the subsequent discussion of this provision, § 310.4(a)(7) of the amended Rule permits telemarketers to substitute a customer service number on the caller identification transmission.

[100] 15 U.S.C. 6106(4).

contribution" because § 1011 of the USA PATRIOT Act amended the Telemarketing Act to specify that "telemarketing" now includes not only calls to induce purchases of goods or services but also calls to induce "*a charitable contribution, donation, or gift of money or any other thing of value.*" [101] The Commission has determined that the term "charitable contribution," defined for the purposes of the Rule to mean "any donation or gift of money or any other thing of value" succinctly captures the meaning intended by Congress. Therefore, the Commission has retained this definition from the proposed Rule. It has, however, determined to modify the proposed definition to eliminate the exemptions included in the proposed Rule.

The proposed definition in the NPRM expressly excluded donations or gifts of money or any other thing of value solicited by or on behalf of "political clubs, committees, or parties, or constituted religious organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status from the United States government." [102] This proposed exemption drew strong comment and criticism. NASCO recommended that a definition of "constituted religious organizations" be included in the Rule to set clear boundaries for what kinds of groups were intended to be included.[103] Hudson Bay stated that "establishing governmentally preferred groups, such as religious organizations or political parties, and providing them with superior access to the public, is in our opinion unquestionably a violation of the Fourteenth Amendment's

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[101] 15 U.S.C. 6106(4) (amended by § 1011(b)(3) of the USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001)).

[102] Proposed Rule § 310.2(f).

[103] NASCO-NPRM at 6.

guarantee of equal protection and of the First Amendment."[104] Similarly, DMA-Nonprofit stated "the Commission has no authority to single out agents of religious organizations for exemption . . . . [T]here is no language in the [USA PATRIOT Act] that allows the Commission to make this distinction." [105]

Based on careful consideration of the record, the Commission is persuaded that no exemptions based upon the type of organization engaged in telemarketing are warranted, and that all telemarketing (as defined in the Telemarketing Act as amended by the USA PATRIOT Act) conducted by any entity within its jurisdiction should be covered by the TSR. This does not mean that the Commission believes political fundraising is within the scope of the Rule.[106] It means only that the TSR applies to all calls that are part of any "plan, program, or campaign" that is conducted by any entity within the FTC's jurisdiction, involving more than one interstate telephone call for the purpose of inducing a purchase of goods or services or a charitable contribution, donation, or gift of money or any other thing of value. Thus, for example, if a for-profit telemarketer on behalf of a (presumably non-profit) political club or constituted religious organization were to engage in a "plan, program, or campaign" involving more than one interstate telephone call

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[104] Hudson Bay-NPRM at 12.

[105] DMA-NonProfit-NPRM at 5-6. *See also* Not-for-Profit Coalition-NPRM at 41.

[106] The USA PATRIOT Act is consistent with a basic common law distinction between charities and political organizations. "Gifts or trusts for political purposes or the attainment of political objectives generally have been regarded as not charitable in nature. Also . . . a trust to promote the success of a political party is not charitable in nature." 15 Am. Jur. 2d *Charities* § 60 (2002). In this regard, it is noteworthy that Congress elsewhere has established a regulatory scheme applicable to political fundraising. 2 U.S.C. § § 431-455.

to induce a purchase of goods or services or a charitable contribution, that activity would be within the scope of the TSR. But if such a for-profit telemarketer on behalf of the same client made calls that were not for the purpose of inducing a purchase of goods or services or a charitable contribution, those calls would not be within the scope of the TSR.

Commenters also addressed the scope of the term "or any thing of value" in the definition of "charitable contribution" in the proposed Rule, suggesting exemptions to limit this definition. Red Cross urged the Commission to exempt blood from the definition of "charitable contribution" because, it argued, "blood donations are not 'a thing of value' in a fiduciary sense." [107] Blood Centers agreed with this position, arguing that while "the donor's blood is of great value to the recipient of the blood donation . . . the donor is not being asked to part with anything other than his or her time." [108] Blood Centers also argued that donations of blood are of grave importance to save lives, and so are distinguishable from typical commercial and even charitable telemarketing calls [109] Another argument raised by Blood Centers in support of its position that a blood donation should be excluded from the definition of "charitable contribution" is that blood donation programs are highly regulated by the Food and Drug Administration ("FDA").[110] March of Dimes also requested that volunteers' time not be considered a "thing of value" under the Rule, noting that their organization often uses the telephone to contact volunteers who then solicit contributions from their friends and neighbors.[111]

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[107] Red Cross-NPRM at 3.

[108] Blood Centers-NPRM at 2.

[109] *Id.*

[110] *Id.* at 2-3.

[111] March of Dimes-NPRM at 2. *See also* AFP-NPRM at 5.

The Commission believes that the text of the USA PATRIOT Act provision expanding the definition of telemarketing to include calls to induce "a charitable contribution, donation, or gift of money or any other thing of value" is broad in scope and plain in meaning. The USA PATRIOT Act specifically uses the term "or any other thing of value" in addition to the terms "charitable contribution, donation, or gift of money," ensuring that it will encompass non-money contributions. The Commission believes that, while blood donors are asked for blood and not money, the blood they donate is clearly a "thing of value." [112] Similarly, although volunteers are asked to give time rather than money, the Commission believes that a donation of time is a "thing of value." [113] Therefore, the Commission cannot exempt from the definition of "charitable contribution" either blood or time volunteered. The Commission believes, however, that legitimate concern about inclusion of blood in the definition should be alleviated by the exemption of charitable solicitation telemarketing from the "do-not-call" registry provisions. The remaining provisions that will apply to telemarketing to solicit blood donations are neither burdensome nor likely to impede the mission of the non-profit organizations that seek such donations.

NAAG and NASCO suggested that the Commission "state that the word 'charitable' does not limit the character of the recipient of the contribution." [114] According to these

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[112] *See* Maryland Health Care, Fall 2000 at 4, http://www.mdhospitals.org/MarylandPubs/ MDHlthCr—1100.pdf (noting the blood shortages had driven up the price of blood from $145.24 per unit to $174.10 per unit in a single year).

[113] Presumably, organizations that rely on volunteers would, absent their donations of time, be forced to pay labor costs associated with the work done by volunteers. Therefore, the time donated is a "thing of value," equivalent to the labor cost saved.

[114] NAAG-NPRM at 52; NASCO-NPRM at 5-6.

commenters, it is important to ensure that donations solicited by or on behalf of public safety organizations are considered "charitable contributions" for regulatory purposes, and that those contributions solicited by sham charities are still "charitable contributions" under the amended Rule.[115] The Commission believes that the current definition, which closely tracks the USA PATRIOT Act definition, is clear as to what is covered.[116] Its focus is on the donation, rather than the solicitor, and it is sufficiently broad in scope to encompass donations solicited on behalf of any organization.

NAAG and NASCO also requested that the Commission explicitly address the situation where a call involves "'percent of purchase' situations, where contributions are sought in the form of the purchase of goods or services, [and] where a portion of the price will, according to the solicitor, be dedicated to a charitable cause." [117] These commenters urged the Commission to ensure that such hybrid transactions are covered, either as sales of goods or services or as charitable contributions, or both, under the Rule.[118] The Commission believes that when the transaction predom-inantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services. The Commission believes that further elaboration on the differences between

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[115] *Id.*

[116] 15 Am. Jur. 2d *Charities* § 60 (2002).

[117] NAAG-NPRM at 52. *See also* NASCO-NPRM at 5-6.

[118] *Id.*

these scenarios is unnecessary because, in either case, the requirements are similar, consisting primarily of avoiding misrepresentations, and promptly disclosing information that would likely be disclosed in the ordinary course of a telemarketing call.

§ 310.2(m)—Donor

The proposed Rule contained a definition of "donor" in order to effectuate the goals of the USA PATRIOT Act amendments. Under that definition, a "donor" is "any person solicited to make a charitable contribution." [119] Throughout the proposed Rule, wherever the word "customer" was used, the Commission added the word "or donor" where appropriate, to indicate that the provision was also applicable to the solicitation of charitable contributions. The Commission received very few comments on this definition. The March of Dimes expressed the concern that "[t]he definition of a 'donor' does not accurately reflect the nomenclature used by the industry." [120] Rather, the March of Dimes suggested, the term "donor," as used in philanthropic circles, "connotes an established relationship with the non-profit charitable organization." [121] The March of Dimes recommended replacing the terms "customer" and "donor" in the Rule with the term "consumer."

The Commission believes that the term "consumer" is too broad and non-specific to substitute for the terms "customer" and "donor." [122] The Rule uses these more targeted terms to

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[119] Proposed Rule § 310.2(m), 67 FR at 4540.

[120] March of Dimes-NPRM at 3.

[121] *Id.* (noting that the term "prospect" is used to mean a potential donor).

[122] The term "consumer" is defined generally as "one that utilizes economic goods." Merriam-Webster's Collegiate Dictionary, at: http://www.merriamwebster.com/cgi-bin/dictionary#. This broader term is used in the Rule in the definition of "established business relationship,"

capture the varied nature of transactions between sellers or telemarketers and individuals who are, or may be, required to pay for something as the result of a telemarketing solicitation. Thus, it is the intent of the Commission that the term "donor" as used in the Rule encompass not only those who have agreed to make a charitable contribution, but also any person who is solicited to do so, to be consistent with its use of the term "customer." Therefore, the Commission has determined that the term "donor" is necessary and appro-priate, and has retained the definition of "donor" in the amended Rule without modification.

§ 310.2(n) —Established business relationship

The Commission has determined to add to the Rule a definition of "established business relationship." This new definition comes into play in § 310.4(b)(1)(iii), which now exempts from the national "do-not-call" registry calls from sellers with whom the consumer has an "established business relationship" (unless that consumer has asked to be placed on that seller's company-specific "do-not-call" list). This definition limits the exemption to relationships formed by the consumer's purchase, rental, or lease of goods or services from, or financial transaction with, the seller within eighteen months of the telephone call (or, in the case of inquiries or applications, within three months of the call).

Industry comments were nearly unanimous in emphasizing that it is essential that sellers be able to call their existing customers.[123] Although the initial comments from consumer

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§ 310.2(n), and in the provision banning the transfer of unencrypted account numbers, § 310.4(a)(5). In each of these instances, the Commission has consciously used the broader term "consumer" to effect broader Rule coverage.

[123] *See, e.g.*, AFSA-NPRM at 13-14; AmEx-NPRM at 3; ANA-NPRM at 5; ARDA-NPRM at 17; ATA-NPRM at 29; BofA-NPRM at 4; Best Buy-NPRM at 1; DialAmerica-NPRM at 12; DMA-NPRM at 33-34; DSA-NPRM at 7-8; ERA-NPRM at 36-37; Gottschalks-NPRM at 1;

groups opposed an exemption for "established business relationships,"[124] their statements during the June 2002 Forum and in their supplemental comments expressed the view that such an exemption would be acceptable, as long as it was narrowly-tailored and limited to current, ongoing relationships.[125] Moreover, state law enforcement representatives' comments on their experience with state "do-not-call"

NCTA-NPRM at 6; NRF-NPRM at 13; PMA-NPRM at 28; Roundtable-NPRM at 5; SIIA-NPRM at 2-3; Time-NPRM at 6-7; VISA-NPRM at 3. *See also, e.g.,* ARDA-Supp. at 1; ICTA-Supp. at 2.

[124] *See, e.g.*, EPIC-NPRM at 20-21; NCL-NPRM at 10. Among other things, consumer advocates opposed such an exemption because of the difficulty in defining a "pre-existing business relationship" without creating significant loopholes in the protections provided by the national "do-not-call" registry (described in the discussion of amended Rule § 310.4(b)(1)(iii) below). *See* NCL-NPRM at 10. Furthermore, they did not agree with industry's argument that consumers want to hear from companies with whom they have an existing relationship. NCL stated that the fact that a consumer may have had a relationship with a company does not necessarily mean that he or she wishes to receive calls, or to continue to receive calls, from that company. NCL-NPRM at 10. Consumer advocates believed the FTC had taken the right approach: the burden should lie with the seller to show specific consent to receive calls. NCL-NPRM at 10; EPIC-NPRM at 20-21; PRC-NPRM at 2.

[125] June 2002 Tr. I at 110 (NCL) ("This would have to be . . . really narrowly defined in order to protect consumers so that if somebody had something that was ongoing . . . that would be in a different category."). *See also* AARP-Supp. at 3 ("AARP recognizes that there may be an expectation by consumers that they will be in contact with businesses with whom they have current, ongoing, voluntary relationship; calls from such businesses are not necessarily unwanted or unsolicited. Calls made from a business with which consumers had a prior relationship are a different matter altogether. In situations where the consumer has chosen not to continue a business relationship, it cannot be presumed they wish to be solicited by that business again. Therefore, AARP believes that any exemption for an existing business relationship must be limited to those situations where the relationship is current, ongoing, voluntary, involves an exchange of consideration, and has not been terminated by either party.").

laws that have an exemption for "established business relationships" suggest that this type of exemption is consistent with consumer expectations.[126] While the Commission is persuaded that an "established business relationship" exemption is necessary and appropriate, it believes that the exemption must be narrowly crafted and clearly defined to avoid a potential loophole that could defeat the purpose of the national "do-not-call" registry.

In adopting the "do-not-call" provisions of the original Rule, the Commission considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations.[127] In crafting an "established business relationship" definition, it is useful again to consider the TCPA, which specifically exempts calls "to any person with whom the caller has an established business relationship."[128] The House Report on the TCPA's

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[126] June 2002 Tr. I at 110-19. *See also* June 2002 Tr. I at 119-22, in which participants discussed an AARP survey conducted in conjunction with the Missouri Attorney General's Office, which showed that three-fourths of consumers did not feel an established business relationship was justified. However, representatives from the Missouri Attorney General's Office explained that the results were less a measure of consumer condemnation of such an exemption, than an indication that consumers were receiving calls from businesses with whom they did not perceive that they had such a relationship. According to the Missouri representatives, businesses took a broader view of the relationship than did consumers. As noted in more detail below, consumers appear to be comfortable with an exemption for "established business relationships" once its parameters are explained to them.

[127] 60 FR at 43855.

[128] 47 U.S.C. 227(a)(3)(B). The legislative history of the TCPA shows that Congress exempted "established business relationship" calls "so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship." H.R. REP. NO. 102-317 at 13 (1991). Throughout the House Report discussing the exemption for "established business relationship," the point is stressed that the

"established business relationship" exemption confirms that Congress intended for the reasonable expectation of the consumer to be the touchstone of the exemption:

> In the Committee's view, an "established business relationship" also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . . By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services. . . . In sum, the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call.[129]

When it promulgated its rules pursuant to the TCPA, the FCC included the following definition of "established business relationship" with regard to its company-specific "do-not-call" requirements:

> The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or

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exemption is intended to reach only those relationships that are *current or recent*. The Report consistently refers to an "established business relationship" in terms of "the existence of the relationship *at the time of the solicitation, or within a reasonable time prior to it.*" *Id.* at 13-15. (emphasis added).

[129] *Id.* at 14, 15.

entity, which relationship has not been previously terminated by either party.[130]

Consideration of state approaches to the "established business relationship" exemption is also instructive. Most state "do-not-call" laws have some form of exemption for "established business relationships," and several of these are modeled on the language of the FCC's exemption.[131] However, there is an important difference between the FCC approach and that of many of the states, in that many state law exemptions circumscribe the scope of an "established business relationship" by specifying the amount of time after a particular event (like a purchase) during which such a relationship may be deemed to exist.[132] The Commission believes that this approach is more in keeping with consumer expectations than an open-ended exemption. As discussed in more detail below, many consumers favor an exemption for companies with whom they have an established relationship. Consumers also might reasonably expect sellers with whom they have recently dealt to call them, and they may be willing to accept these calls. A purchase from a seller ten years ago, however, would not likely be a basis for the consumer to expect or welcome solicitation calls from that seller.

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[130] 47 CFR 64.1200(f)(4).

[131] Fourteen state "do-not-call" statutes are open-ended and do not contain a time limit for tolling the established business relationship: Alabama, California, Connecticut, Florida, Georgia, Idaho, Kentucky, Maine, Minnesota, Oregon, Texas, Vermont, Wisconsin, and Wyoming. Three of these "open-ended" state statutes incorporate the FCC definition either in whole or in part: California, Texas, and Wyoming. In addition, four other states incorporate the FCC definition in whole or in part, but limit the time period during which a business may claim an "established business relationship" once the relationship has lapsed: Colorado, Kansas, Oklahoma, and Pennsylvania. See note 592 below for citations to all state "do-not-call" statutes.

[132] *See* discussion and note 135 below.

In addition, specific time limits for an "established business relationship" are particularly appropriate for a general "do-not-call" registry such as the one to be maintained by the Commission, as opposed to the company-specific "do-not-call" lists for which the FCC definition was crafted. The Commission believes that an "established business relationship" exemption in a national list applying to many sellers and telemarketers should be carefully and narrowly crafted to ensure that appropriate companies are covered while excluding those from whom consumers would not expect to receive calls. A specific time limit balances the privacy needs of consumers and the need of businesses to contact their current customers.

Comments received in response to the NPRM stress the importance of extending such an exemption to current, existing relationships and prior relationships that occurred within a reasonable period of time.[133] Throughout the comments from industry stressing the need for an "established business relationship" exemption, a consistent theme is that such an exemption is necessary for "existing customers" or someone with whom sellers "currently do business," and there seems to be a common understanding

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[133] The comments received on "established business relationship" came primarily from the business community. On the other hand, there was little comment from consumer advocates and state regulators on how such an exemption would be formulated because the proposed Rule did not include an "established business relationship" exemption. However, the NPRM did ask about the effect on companies and charitable organizations with whom consumers had a pre-existing business or philanthropic relationship of the proposal to allow companies to call consumers on the "do-not-call" registry if they had given their express verifiable authorization to call (67 FR at 4539, question 9). As discussed in more detail above in note 124, those few consumer advocates who did mention such an exemption were opposed to it.

regarding what constitutes an "existing" relationship.[134] There is less consensus when it comes to the issue of how long a business relationship lasts following a transaction between a seller and consumer. Many states have attempted to provide some clarity regarding how long after dealings between a consumer and seller have ceased that a residual "established business relationship" could be deemed still to exist.

Twelve of the states that have an "established business relationship" exemption limit it to a specific time period after a transaction has occurred, ranging from six months to 36 months.[135] Industry commenters suggested various time periods to limit the exemption. Several suggested 24 to 36 months, while others stated that a shorter period (12 months) would be more appropriate.[136] The Commission believes,

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[134] *See, e.g.*, ABA-NPRM at 10; Community Bankers-NPRM at 2; AmEx-NPRM at 3; ANA-NPRM at 5; Associations-NPRM at 2; ARDA-NPRM at 17; Bank One-NPRM at 4; BofA-NPRM at 4; Best Buy-NPRM at 1; Cendant-NPRM at 5-6; Citigroup-NPRM at 4; Comcast-NPRM at 3; CMC-NPRM at 6; Cox-NPRM at 2, 4; DMA-NPRM at 33, 34; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Gottschalks-NPRM at 1; NCTA-NPRM at 4; NRF-NPRM at 13; SIIA-NPRM at 2-3; Time-NPRM at 6; VISA-NPRM at 3.

[135] Six months (Louisiana, Missouri); 12 months (Pennsylvania, Tennessee); 18 months (Colorado, Illinois); 24 months (Alaska, Massachusetts, Oklahoma); 36 months (Arkansas, Kansas). In addition, New York apparently has adopted an 18-month time period: the New York statute does not contain a time limit; however, at the June 2002 Forum, NYSCPB stated that New York applies an 18-month time limit. June 2002 Tr. I at 115 ("We have two separate exemptions. . . . The second thing is a prior business relationship, which we define as an exchange of goods and services for consideration within the preceding 18 months. . . ."). Indiana's statute does not have an exemption for "established business relationships."

[136] Industry commenters generally supported a 24-month time period, but did not submit data that would tend to show that a shorter time period would not serve their purposes. The breakdown of suggested time periods is as follows: "recently terminated or lapsed" (New Orleans-NPRM at 14-

based on the record evidence and statements from Congress regarding the TCPA's "established business relationship," that a company should be able to claim the exemption only if there has been a relatively recent transaction between the customer and the seller sufficient to support the existence of an "established business relationship."

Based on the comments, the Commission finds little support for a 36-month time period. Most of the commenters who suggested that time period did so as part of a joint comment filed by five associations.[137] In the comments the individual associations filed separately, however, they suggested a time period of 24 months.[138] NAA initially suggested 24 months, but expanded that to 36 months in its supplemental comment. Industry commenters who advocate 24 months provide little support for their assertion that it is the appropriate length of time by which to measure "reasonableness;" nor did they submit data that would show that a shorter time period would not serve their purposes. Other industry members (such as Bank of America, Consumer Mortgage Coalition, and Federated Department Stores) suggested shorter time periods. The Commission does not believe that a relationship which terminated or lapsed two years ago would constitute a relationship that had recently terminated or lapsed. The Commission believes that if consumers received a call from a company with whom the

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15); 12 months (BofA-NPRM at 4; CMC-NPRM at 6-7); 24 months (ATA-Supp. at 8; ERA-NPRM at 38; ERA-Supp. at 19; MPA-Supp. at 11; NAA-NPRM at 11; June 2002 Tr. I at 109 (PMA)); 36 months (ARDA-NPRM at 20; Associations-Supp. at 3-4). In a supplement to their comment, FDS supported limiting telemarketing sales calls to customers who have made a purchase in the past 12 months, while allowing strictly informational calls to persons who have had a transaction within the past 36 months. Federated-Supp. at 1-2.

[137] *See* Associations-NPRM at 3-4.

[138] *See* note 136 above.

most recent purchase, rental, lease or financial transaction occurred or lapsed two years ago or longer, consumers would likely be surprised by that call and find it to be unexpected.

The Commission believes that 18 months is an appropriate time frame because it strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when. By extending beyond a single annual sales cycle, the 18-month period allows sufficient time for businesses to renew contact with prospects who may only purchase once a year. Moreover, limiting the "established business relationship" to 18 months from the date of the last purchase or transaction would be at least as restrictive as the majority of states that have such an exemption, thus achieving greater consistency for both industry and consumers. The experience of states that have an "established business relationship" exemption in their "do-not-call" laws indicates that a relatively limited "established business relationship" exemption does not conflict with consumers' expectations. At the June 2002 Forum, the representatives from New York and Missouri spoke about consumer expectations in connection with their states' "do-not-call" lists.[139] Both noted that consumers appeared to be comfortable with such an exemption because they had received few complaints from consumers regarding companies with whom they had an established relationship.[140]

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[139] *See* June 2002 Tr. I at 110-21.

[140] *Id.* at 118-19 (New York: "Well, [consumers are not unhappy], and a lot of times they complain, and you could say they're [sic] prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad.") (Missouri: "Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted,

The states' experience is not contradicted by the comments of individual consumers in response to a specific question included on the Commission's website inviting email comments from the public. Although 60 percent of consumers who responded to this question stated that they opposed an exemption for "established business relationship," 40 percent favored such an exemption.[141]

Furthermore, a study conducted in 2002 by the Information Policy Institute found that consumers preferred a "nuanced approach" to the "do-not-call" issue, wanting to limit some calls to their household, but not all calls.[142] According to the study, 50 percent of consumers surveyed supported regulations that would allow local or community-based organizations to call during specific hours of the day.[143] Furthermore, slightly less than half of the respondents supported legislation that would allow calls, but only from local or community-based organizations with whom they have an existing relationship.[144] The survey showed that consumers were less likely to welcome calls from national companies, although 40 percent indicated that they would

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because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now.").

[141] Analysis of consumer email comments in the Commission's TSR comment database indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1,080 opposed such an exemption. Furthermore, over 13,000 of the 14,971 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a "do-not-call" registry to block other calls.

[142] Michael A. Turner, "Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices" (Information Policy Institute, June 2002) at 4, 8 (hereinafter "Turner study").

[143] *Id.*

[144] *Id.*

allow calls from national organizations with whom they had an existing relationship.[145]

In sum, consumers are split over whether they favor an "established business relationship" exemption. Given the difference of opinion among consumers, and industry's convincing arguments regarding the detrimental effects the lack of an exemption would cause, the Commission is persuaded to provide an exemption for "established business relationships."

The definition of "established business relationship" in the amended Rule would limit the exemption in the case of inquiries and applications to three months after the date of the application or inquiry (except with the consumer's express consent or permission to continue the relationship). The Commission believes that a consumer's reasonable expectations are different in the case of inquiries and applications as compared to purchase, rental, and lease transactions. A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application, not one after an extended period of time. Comments from NYSCPB at the June 2002 Forum also warned of possible abuse in the creation of an "established business relationship" based on inquiries from consumers.[146] The Commission

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[145] *Id.*

[146] [146]: June 2002 Tr. I at 116 (NYSCPB) ("[D]oes a mere inquiry constitute a business relationship? And our answer to that is no, because we have had some what I would say are really sleazy operators. They will call up and leave a message on your phone. They won't even identify who they are. They will simply say 'Call us back, it's very important.' You call back out of curiosity or whatever, okay, and then all of a sudden they feel free to bombard you for the next few years with calls."). The Commission intends that such a practice would not entitle a seller or telemarketer to make calls to consumers by claiming to have an "established business relationship."

believes three months should be a sufficient time frame in which to respond to a consumer's inquiry or application.

The amended Rule allows for an 18-month time limit where there has been a purchase, rental or lease, or other financial transaction between the customer and seller. The 18-month time limit for an "established business relationship" based on a purchase, lease, rental, or financial transaction runs from the date of the last payment or transaction, not from the first payment. In instances where consumers pay in advance for future services (e.g., purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product. For such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front. Sellers who provide products or services where the consumer is required to pay in advance can also get the consumer's express agreement to call, as provided in § 310.4(b)(1)(iii)(B)(i).

Several financial services industry commenters urged that any "established business relationship" exemption should encompass all affiliates of a seller.[147] These commenters noted that regulatory requirements often dictate the corporate structure of financial institutions, which must market products and services across holding company affiliates and subsidiaries.[148] For that reason, they suggested that any exemption for an "established business relationship" should extend to all members of a corporate family, including affiliates and subsidiaries, so long as the individual has an "established business relationship" with any member of that

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[147] *See, e.g.*, BofA-NPRM at 4; Bank One-NPRM at 4; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Fleet-NPRM at 4; VISA-NPRM at 3-4.

[148] *See* Bank One-NPRM at 4; Fleet-NPRM at 4.

corporate family.[149] They also suggested that agents of the seller be included within the exemption if the consumer reasonably would expect the agent to be included under the exception.[150]

The Commission believes that such a broad definition of "established business relationship" is inappropriate in the context of a "do-not-call" registry which is intended to protect consumers' privacy. As stated earlier, the Commission believes that such an exemption must be narrowly crafted to avoid defeating the purpose of the "do-not-call" registry. In determining whether affiliates or subsidiaries should be encompassed within an "established business relationship," the Commission looks to consumer expectations: If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national "do-not-call" registry?

The Commission used similar reasoning in resolving this issue in connection with the definition of "seller" in the original Rule. In the discussion on the definition of "seller," the Commission stated that there were several factors that it would consider in determining how it would view the Rule's application to diversified companies or divisions within one parent organization. Among those factors was "whether the nature and type of goods or services offered by the division are substantially different from those offered by other divisions of the corporation or the corporate organization as a whole." [151] This distinction looks to consumer expectations and whether a consumer would perceive the division to be the

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[149] *See* Eagle Bank-NPRM at 2; HSBC-NPRM at 2; Roundtable-NPRM at 5.

[150] *See* Roundtable-NPRM at 5.

[151] 60 FR at 43844.

same as or different from other divisions or from the corporate organization as a whole. For example, a consumer who had purchased aluminum siding from Company A's aluminum and vinyl siding subsidiary would likely not be surprised to receive a call from kitchen remodeling service also owned by, and operating under the name of, Company A.

Thus, under the amended Rule, some but not all affiliates will be able to take advantage of the "established business relationship" exemption to the national "do-not-call" registry. The Commission intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate. The consumer's expectations of receiving the call are the measure against which the breadth of the exemption must be judged.

§ 310.2(o) —Free-to-pay conversion

Section 310.2(o) of the amended Rule sets out a new definition:—"free-to-pay conversion." In connection with an offer or agreement to sell or provide goods or services, a "free-to-pay conversion" is "a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period." The term "free-to-pay conversion" is the terminology commonly used in the telemarketing industry to describe what was referred to throughout the Rule Review proceeding as a "free trial offer."[152]

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[152] *See, e.g.*, Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy—consent.html; Magazine Publishers of America, Resources -Research: "Advance Consent Subscription Plans," http://www.magazine.org/resources/advance—consent.html.

A "free-to-pay conversion" is a form of "negative option feature"—a term that is also newly defined in the amended Rule and is discussed below. The term "free-to-pay conversion" comes into play in the amended Rule in three provisions. First, as a form of negative option feature, any "free-to-pay conversion" is subject to the newly-added disclosure requirements in § 310.3(a)(1)(vii). Second, where a telemarketing offer involves a "free-to-pay conversion," and is accepted by a consumer using a payment method subject to the express verifiable authorization requirements of § 310.3(a)(3), the seller or telemarketer may not use the written confirmation form of authorization generally available under § 310.3(a)(3)(iii). Third, under the new unauthorized billing provision at § 310.4(a)(6), the amended Rule sets forth specific requirements to obtain express informed consent in any transaction involving preacquired account information and a "free-to-pay conversion." Each of these provisions is discussed in detail below.

§ 310.2(q)—Material

The amended Rule retains unchanged the definition of "material" from the original Rule, except for extending it to charitable contributions pursuant to the mandate of the USA PATRIOT Act. The Commission received no comments on this definition in response to the NPRM. The amended Rule has deleted the designations for subsections (a) and (b) that had been proposed in the NPRM. This is merely a formatting change and does not alter the substantive content of the definition. The amended Rule's definition of "material," therefore, reads: "likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution."

§ 310.2(t)—Negative option feature

The amended Rule includes new requirements in § 310.3(a)(1)(vii) for specific material disclosures necessary

to avoid misleading consumers with respect to offers that entail incurring an obligation to pay a seller due to the consumers' non-action. To describe the circumstances when these disclosures must be made, the amended Rule employs the term "negative option feature" and, accordingly, provides a definition of that term in § 310.2(t). A "negative option feature" is any provision under which the consumer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. This provision includes, but is not limited to, "free-to-pay conversions," (which are discussed above), as well as negative option plans [153] and continuity plans.[154] Section 310.3(a)(1)(vii) below provides a detailed

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[153] Under a "negative option plan," the customer agrees to purchase a specific number of items in a specified period of time. The customer receives periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the customer unless the customer tells the company not to send it. *See* the Commission's Rule governing "Use of Negative Option Plans by Sellers in Commerce," 16 CFR 425.

[154] A "continuity plan" consists of a subscription to a collection or series of goods. Customers are offered an introductory selection and agree to receive additional selections on a regular basis until they cancel their subscription. Unlike negative option plans, customers do not agree to buy a specified number of additional items in a specified time period, but may cancel their subscriptions at any time. Continuity plans resemble negative option plans in that customers are sent announcements of selections and those selections are shipped automatically to the customer unless the customer advises the company not to send them. Unlike negative option plans, however, customers are not billed for the selection when it is shipped, but only if they do not return the selection within the time specified for the free examination period. *See, e.g.*, FTC Facts for Consumers, "Continuity Plans: Coming to You Like Clockwork," (June 2002), http://www.ftc.gov/bcp/online/pubs/products/continue.htm. *See also* FTC, "Pre-Notification Negative Option Plans" (May 2001) (distinguishing these plans from continuity plans), http:// www.ftc.gov/bcp/online/pubs/products/negative.htm); and FTC, "Facts for Business:

discussion of the definition of "negative option feature" and the disclosures necessary when such a provision is a part of an offer to sell goods or services.

§ 310.2(u)—Outbound telephone call

Based on a review of the record, the Commission has decided to retain the definition of "outbound telephone call" that was in the original Rule, and not to expand the definition to include "upsell" transactions, as proposed in the NPRM. Many commenters noted that, by including upselling in the proposed Rule's definition of "outbound telephone call," the proposal brought upselling transactions within all of the provisions relating to outbound calls, which led to unintended and undesirable consequences, such as subjecting upsells to the calling time restrictions and national "do-not-call" registry provisions.[155] The amended Rule addresses upselling transactions separately, rather than attempting to sweep them within the definition of "outbound telephone call."[156] The amended Rule reinstates the original definition of "outbound telephone call," with only a modification to reflect the expanded reach of the Rule to charitable contributions pursuant to the USA PATRIOT Act. In the amended Rule, then, an "'[o]utbound telephone call' means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution."

Complying with the Telemarketing Sales Rule," http:// www.ftc. ov/bcp/online/pubs/buspubs/tsr.htm.

[155] *See, e.g.*, ABA-NPRM at 4; AmEx-NPRM at 6; AFSA-NPRM at 16; Associations-NPRM at 3; Cendant-NPRM at 2; CCC-NPRM at 13; Cox-NPRM at 6; KeyCorp-NPRM at 6; Metris-NPRM at 9; MBA-NPRM at 4; NBCECP-NPRM at 2; NCTA-NPRM at 13-14; PCIC-NPRM at 1; PMA-NPRM at 10-11; Time-NPRM at 10; VISA-NPRM at 8; Wells Fargo-NPRM at 5-6.

[156] *See* § 310.2(dd), defining the term "upselling" in the amended Rule.

§ 310.2(w)—Preacquired account information

The amended Rule adds a definition of "preacquired account information" to address the problems that have been associated with telemarketing transactions where the telemarketer already has access to the customer's billing information at the time the outbound call is placed.[157] The NPRM discussed these problems at length. The Commission used the term "preacquired account telemarketing" in the NPRM during its discussion of the proposed ban on disclosing or receiving billing information for use in telemarketing, but did not use the term itself in the proposed Rule, and so did not define it.[158] In response, several industry commenters asked for more specificity as to what the Commission intends the term to mean.[159] Thus, the definition of "preacquired account information" also serves to address these commenters' concerns about clarifying the concept of preacquired account telemarketing.

As explained in detail in the discussion of § 310.4(a)(6) below, the amended Rule sets forth specific requirements for obtaining express informed consent in any telemarketing transaction that involves "preacquired account information." To clarify the situations where these requirements come into play, the amended Rule defines "preacquired account information" as:

> any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the

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[157] *See* discussions of amended Rule § § 310.4(a)(5) and (6) below.

[158] *See* 67 FR at 4512-14.

[159] *See, e.g.*, June 2002 Tr. II at 123-24 (CCC), 133-34 (ERA) and 173 (ATA); PMA-NPRM at 13-14; MPA-Supp. at 5; PRA-NPRM at 13-14.

telemarketing transaction pursuant to which the account will be charged.

The Commission intends this definition to be construed broadly. The definition includes any type of billing information, encrypted or unencrypted,[160] that enables a seller or telemarketer to cause a charge to be placed on any customer's or donor's account without obtaining the account number directly from the customer or donor. It obviously covers instances where the seller or telemarketer is in actual possession of account information, whether by virtue of some prior relationship with the consumer or otherwise. It also is intended specifically to address affinity marketing campaigns where, for example, through a joint marketing arrangement, Seller A provides access to its customer base and those customers' accounts or account numbers to Seller B in exchange for a percentage of the proceeds from each sale.[161]

Some industry members expressed their belief that this second class of transactions does not involve preacquired account information at all because, in such affinity marketing campaigns, Seller B may possess only encrypted account numbers, or no account numbers at all prior to initiating the call to the consumer.[162] The Commission intends to clarify

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[160] By "unencrypted," the Commission means both unencrypted readable account information, and encrypted information in combination with a decryption key. *See* discussion of amended Rule § 310.4(a)(5) below.

[161] *See* 67 FR at 4513.

[162] ERA/PMA-Supp. at 14; June 2002 Tr. II at 134 (ERA). ERA described such a scenario during the June 2002 Forum:

> "What typically might occur is L.L. Bean might enter into some type of [affinity] agreement with Timberland to say, We would like you to sell your boots . . . to our customers. . . . So L.L. Bean would provide the name and telephone number . . . and they might provide some unique identifier, it could be a four digit code. It might be an encrypted code that's used solely for the purpose of matching back,

that such an arrangement does involve "preacquired account information," since the seller or telemarketer does not have to obtain the account number from the customer or donor in order to cause a charge to be placed on the customer's or donor's account.

Finally, this definition would apply to upsell transactions, because the seller or telemarketer in the upsell transaction may either already possess the account information from the initial transaction, or would, by virtue of a joint marketing or other arrangement, have access to that information, so as to be able to charge the customer without getting the account number directly from the customer in the upsell transaction.

§ 310.2 (cc) —Telemarketing

The Commission received very few comments on its proposed definition of "telemarketing," [163] but those it did receive expressed agreement that the definition should continue to include the phrase "by use of one or more telephones," to ensure that large and small telemarketing

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but the account billing number or any information that would provide access to the account is not transmitted to the telemarketer when you make that call. They make the call to the consumer. They ask the consumer if they want to order the boots. If the customer says yes, that information is then transferred to Timberland. Timberland would go back to L.L. Bean and say, This customer has accepted our offer. We would now like to get the account information to bill the consumer for something that they've authorized."

June 2002 Tr. II at 136-37.

[163] Although few commenters directly addressed this definition, many who commented on the USA PATRIOT Act amendments discussed the expansion of the Rule to cover the solicitation of charitable contributions. These comments are addressed above, in the discussion of amended Rule § 310.1 relating to the scope of the Rule.

operations are covered by the Rule.[164] Based on the Commission's review of the record in this proceeding, the amended Rule retains unchanged the definition of "telemarketing" that was proposed in the NPRM. This definition is virtually the same as that in the original Rule, except that it now includes the phrase "or a charitable contribution" following "goods or services," pursuant to the mandate of the USA PATRIOT Act.

§ 310.2(dd) —Upselling

As described above in § 310.2(u), the Commission proposed in the NPRM to modify the Rule's definition of "outbound telephone call" to include most upsell transactions.[165] The majority of commenters who addressed this issue, including both industry members and consumer groups, supported the proposition that upsells should be expressly included in the Rule.[166] Most of these commenters, however,

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[164] DOJ-NPRM at 1 (noting its experience with fraudulent telemarketers operating using only one or two telephones); Patrick-NPRM at 2 (urging that the practice of subcontracting telemarketing to individual sales agents who work from their homes using their home phones continue to be captured by the Rule).

[165] Specifically, the Commission proposed amending the definition to mean "any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization." Proposed Rule § 310.2(t), 67 FR at 4541.

[166] *See, e.g.*, AmEx-NPRM at 6 ("We agree with the Commission that the disclosure requirements of the TSR should apply whenever a new offer is made to the consumer, whether by the original telemarketer or a telemarketer to whom a call is transferred. Consumers should always be informed of material terms and conditions before they purchase a product."); ERA-NPRM at 8, 11 ("The ERA is cognizant of the fact that the practice of upselling has increased dramatically since the Rule was originally promulgated in 1995. . . . The ERA acknowledges the Commission's desire to include upsells within the ambit of the Rule and

suggested that the Commission's proposal to address the problem by expanding the definition of "outbound telephone call" to include upselling was not the most effective way to achieve this goal.[167] Instead, many commenters recommended treating upsells as a distinct type of transaction by adding a definition of "upselling" to the Rule and specifying a unique set of disclosures required in upsell transactions.[168] Others suggested retaining the expanded definition of "outbound telephone call" but amending it to avoid application of certain provisions unnecessary or inappropriate to the upselling context,[169] such as application of the "do-not-call" and calling time provisions of the Rule, to upsells.[170] The Commission

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supports the position that, in instances where solicitations are made during a single telephone call on behalf of multiple unaffiliated entities, there should be a clear disclosure. . . ."); ERA-Supp. at 6; LSAP-NPRM at 6; NAAG-NPRM at 36; NCL-NPRM at 3; PMA-NPRM at 4, 8 ("PMA acknowledges that the practice of marketing products and services via upsell offers has increased in recent years and that the existing TSR does not provide express guidance regarding responsible marketing practices via the upsell channel."); June 2002 Tr. II at 213-15, 249-50. But see CCC-NPRM at 15-16; CMC-NPRM at 7; Household Auto-NPRM at 3; Keycorp-NPRM at 5-6; Noble-NPRM at 3; NATN-NPRM at 3-4; NSDI-NPRM at 4; PCIC-NPRM at 1-2; Technion-NPRM at 5.

[167] AmEx-NPRM at 6; ARDA-NPRM at 4; DMA-NPRM at 38; ERA-NPRM at 8, 12; Household Auto-NPRM at 3; ICT-NPRM at 2; E-Commerce Coalition-NPRM at 2; NCTA-NPRM at 14; PMA-NPRM at 8-10; SIIA-NPRM at 3; Time-NPRM at 9; June 2002 Tr. II at 213-14.

[168] *See, e.g.*, ERA-NPRM at 14-15; ERA-Supp. at 6; PMA-NPRM at 8-10.

[169] ARDA-NPRM at 4; Cox-NPRM at 36; Discover-NPRM at 5; Eagle Bank-NPRM AT 4; NCL-NPRM at 3.

[170] ABA-NPRM at 4-5; AFSA-NPRM at 15; ARDA-NPRM at 4; CCC-NPRM at 13; DMA-NPRM at 38; Eagle Bank-NPRM at 4; NCTA-NPRM at 14; PMA-NPRM at 10; SIIA-NPRM at 3; Time-NPRM at 10. The "do-not-call" provision is found at proposed and amended Rules § 310.4(b)(1)(iii), while the calling time restrictions are at proposed and amended Rules § 310.4(c).

does not intend for upselling to be subject to the "do-not-call" requirements or the calling time restrictions in the Rule.[171] The goal of the initial proposal,[172] and the focus of the current amendments, is to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule.

Based upon the comments received during the rulemaking period and the Commission's law enforcement experience, the Commission has taken a two-fold approach to upselling in the amended Rule. The Commission has added a definition of "upselling," which, in combination with certain amendments to § § 310.4(d) and 310.6 of the Rule,[173] provides important protections to consumers who, after completing one transaction, are offered goods or services in an additional telemarketing transaction during the same telephone call.[174] By including the definition, the Commission intends to clarify that upsells are subject to all of the Rule's requirements

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[171] June 2002 Tr. II at 213-15.

[172] *See* 67 FR at 4500.

[173] Section 310.4(d) now includes the phrase "or internal or external upsell" after "outbound telephone call" to clearly state that the basic disclosure requirements of that provision—the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and disclosures related to prize promotions—must be made in any upsell associated with an initial telephone transaction. Sections 310.6(b)(4), (5) and (6) have been amended to expressly exclude upsells from these exemptions.

[174] The provisions relating to "upselling" address the practices which the Commission had proposed to address in the NPRM through modification of the definition of "outbound telephone call." Because the amended Rule addresses the practice of "upselling" in a different manner, the amended Rule retains unchanged the wording in the original Rule for the definition of "outbound telephone call" (now expanded to cover calls to induce charitable contributions, pursuant to the USA PATRIOT Act). *See* § 310.2(u) of the amended Rule.

except the "do-not-call" and calling time restrictions in §§ 310.4(b)(1)(iii) and 310.4(c).[175] With this definitional shift, the "do-not-call" regime no longer applies to upsells, since the "do-not-call" provisions specifically prohibit "initiating outbound telephone calls" to anyone who has placed their telephone numbers on a company-specific "do-not-call" list or on the FTC's "do-not-call" registry.[176] Second, the amended Rule expressly excludes upsell transactions from the exemptions in §§ 310.6(b)(4), (5) and (6)—i.e., where the initial transaction is exempted from the Rule because the call was initiated by the consumer unilaterally or because it was initiated in response to a direct mail solicitation or general media advertisement.[177]

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[175] In the NPRM, the Commission noted that in addition to the disclosure requirements of § 310.4(d) (and the proposed disclosures of § 310.4(e)), the disclosures in § 310.3(a)(1):

> "would, of course, also have to be made by each telemarketer. In fact . . . the Commission believes that [in any upsell] it is necessary for this transaction to be treated as separate for the purposes of complying with the TSR. Therefore, in such an instance, the telemarketer should take care to ensure that the customer/donor is provided with the necessary disclosures for the primary solicitation, as well as any further solicitation. Similarly, express verifiable authorization for each solicitation, when required, would be necessary. Of course, even absent the Rule's requirement to obtain express verifiable authorization, telemarketers must always take care to ensure that the consumer's or donor's explicit consent to the purchase or contribution is obtained."

67 FR at 4500, n.71.

[176] *See* § 310.4(b)(1)(iii).

[177] Treating upsells as "outbound telephone calls" meant that they were implicitly not covered by any of these exemptions (which all involve inbound telephone calls of one sort or another). Creating a separate definition for "upselling" requires that the Commission explicitly address which of the exemptions in § 310.6 of the Rule do not apply to upselling.

The definition of "upselling" encompasses any solicitation for goods or services that follows an initial transaction of any sort in a single telephone call. Thus, both solicitations made by or on behalf of the same seller involved in the initial transaction, and those made by or on behalf of a different seller are considered upsells, and both types of transactions are covered by the Rule.[178] The term "initial transaction" is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to sales offers, customer service calls initiated by either the seller or telemarketer or the consumer, consumer inquiries, or responses to general media advertisements or direct mail solicitations. The upsell is defined as a "separate telemarketing transaction, not a continuation of the initial transaction" to emphasize that an upsell is to be treated as a new telemarketing call, independently requiring adherence to all relevant provisions of the Rule.[179]

Upselling occurs in a wide variety of circumstances—as an addendum to a customer service call, or after an initial offer of goods or services via an inbound or outbound telephone

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[178] In the NPRM, the Commission focused its analysis of upselling on whether there were one or two telemarketers or sellers involved in the upsell transaction. After reviewing the record in this matter, the Commission believes that the salient distinction is whether a separate offer is made in the course of a single telephone call.

[179] This definition also addresses the concerns of some telemarketers that simply transferring a consumer-initiated call to the individual most qualified to address the consumer's inquiry would trigger the application of the Rule to that otherwise exempt transaction. *See, e.g.*, CMC-NPRM at 7-8; Cox-NPRM at 35; Eagle Bank-NPRM at 4; HSBC-NPRM at 2. Instead of focusing on the transfer of a call, the definition of "upselling" centers on the instigation of an offer for sale of goods or services subsequent to an initial transaction. Thus, where a consumer calls a company, makes an inquiry, and is *immediately* transferred in direct response to that inquiry, that transfer would not fall within the definition of "upselling" and would not be subject to the Rule.

call, for example.[180] The upsell can be made by or on behalf of the same seller involved in the initial transaction ("internal upsell"), or a different seller ("external upsell").[181] Commenters argue that upsell transactions provide benefits to both sellers and consumers. According to some industry commenters, sellers can reduce costs associated with telemarketing by linking transactions together in a single call,[182] and are more likely to make successful sales to consumers already predisposed to the transaction.[183] Consumers can

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[180] *See, e.g.*, NAAG-NPRM at 33 ("The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair. . . . Some examples are the upsell of membership programs, magazines and the like or a television solicitation to buy an inexpensive lighting product that includes an upsell of a costly membership program, consumers sold a membership program when attempting to purchase United States flags following the September 11, 2001, tragedy, or tickets to entertainment events.") (citations omitted). Industry commenters emphasized the prevalence of upselling in the inbound call context generally. *See, e.g.*, CCC-NPRM at 12; ERA-NPRM at 11-12; PMA-NPRM at 9-10

[181] The NPRM described these forms of upselling as "internal" and "external." 67 FR at 4496. Some commenters, such as ERA, noted that the industry refers to multiple offers by a single seller—what the Commission calls an "internal upsell"—as a "cross sell," and to multiple offers by separate sellers—what the Commission calls an "external upsell"—as an "upsell." ERA-NPRM at 9, n.3. The Commission's approach, however, does not appear to have caused any confusion in the industry, or on the consumer side. So, for the sake of consistency both within the rulemaking process and with existing law enforcement cases, the Commission has decided to retain these terms as originally proposed.

[182] *See, e.g.*, PMA-NPRM at 9.

[183] CCC determined that 14 billion inbound calls are made per year, of which 40 percent have an upsell associated with them. June 2002 Tr. II at 218. ERA estimated, based on a 12 percent conversion rate, that approximately $1.5 billion in sales are generated through inbound upsells alone each year. ERA-NPRM at 11. Aegis estimated the conversion rate for consumers accepting upsell offers at between 25 and 30 percent. Aegis-NPRM at 4.

benefit from the convenience of such transactions, and from receiving more targeted marketing offers.[184] Industry commen-ters also suggested that sellers' reduced costs in such transactions are passed along as savings to consumers.[185]

Despite these benefits, upsells are no less vulnerable to abuse than other telemarketing practices, and provide the potential for harm to consumers. Some industry commenters argued that this is not the case, suggesting that, particularly when the call is initiated by the consumer: "The consumer calling a business voluntarily puts herself in a business environment and knows that she is doing so. It should come as no surprise to the consumer if, once in that environment, she is solicited for products and services provided by affiliates or partners of the business . . . ." [186]

According to NCL, however, "[c]omplaints to the NFIC [National Fraud Information Center] indicate that abuses can occur when consumers who respond to an advertisement for one thing are then solicited for something else, especially if the new offer is significantly different than the original one or is from another vendor. In these situations, the only information that consumers have on which to decide whether to make a purchase or donation is that which is provided during the call." [187] In other words, in any upsell, the seller or telemarketer initiates the offer; it is not the consumer who solicits or requests the transaction. This means that the

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[184] DMA-NPRM at 40; PMA-NPRM at 10; SIIA-NPRM at 3.

[185] ERA-NPRM at 12; PMA-NPRM at 10; SIIA-NPRM at 3.

[186] CMC-NPRM at 9. *See also* Citigroup-NPRM at 6-7; Fleet-NPRM at 5; Household Auto-NPRM at 4.

[187] NCL-NPRM at 3. *Accord* ERA-NPRM at 11 ("The ERA is . . . aware of the fact that there have been some marketers who have engaged in unscrupulous marketing practices in soliciting purchases via upsells, particularly when such upsells involve a free trial offer and/or other advance consent marketing technique.").

consumer is hearing the terms of that upsell offer for the first time over the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase. This makes an upsell very much akin to an outbound telephone call from the consumer's perspective, even when the seller is someone with whom the consumer is familiar. Thus, as NCL noted, every consumer needs "the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions [of the offer]" regardless of the nature of the telephone sale.[188] The disclosure provisions of §§ 310.3(a) and 310.4(d) were designed to ensure that consumers know they are being offered goods or services for sale, and receive all information material to their decision to accept an offer before they pay for the purchase.

Moreover, it should be noted that the introductory paragraphs of § § 310.3(a), 310.4(a) and 310.5 do not distinguish between types of telemarketing transactions.[189] The Rule is clear that its requirements and prohibitions apply to *all sellers and telemarketers* that are subject to the Commission's jurisdiction. Thus, a seller or telemarketer subject to the Rule must abide by the requirements of these sections, regardless of whether they are engaged in an initial telemarketing

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[188] June 2002 Tr. II at 221-22.

[189] Section 310.3(a) states "it is a deceptive telemarketing act or practice and a violation of this Rule *for any seller or telemarketer to engage in the following conduct.*" (emphasis added). Similarly, § 310.4(a) states "it is an abusive telemarketing act or practice and a violation of this Rule *for any seller or telemarketer to engage in the following conduct.*" (emphasis added). Section 310.5(a) states "any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities."

transaction or in an upsell transaction. Indeed, the Commission assumes that, where the initial transaction is subject to the Rule, most sellers and telemarketers treat the upsell as subject to the Rule as well, and comply with the Rule's requirements in both segments of the telephone call.[190]

The Commission also finds that consumers should have the Rule's billing protections in each of these transactions. CCC suggested that, at least in inbound calls that include upsells, consumers have "the highest level of consumer protection because the consumer is specifically asked and consents to the additional goods or services being charged to the same billing source the consumer provided and/or accessed just moments before." [191] However, the Commission's and states' law enforcement experience does not support CCC's assertion that, by giving consent to the use of an account

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[190] The record suggests, however, that the opposite is true when upsells are appended to calls that are otherwise exempt from the Rule. In these instances, the upsells have been treated as part of the exempt telemarketing transaction and, thus, consumers are not receiving the protections the Rule requires when a consumer receives an outbound telephone call, despite the fact that upsells are similar to outbound calls from the consumer's perspective. *See, e.g.*, PCIC-NPRM at 1-2. The Commission believes that the protections provided a consumer in an upsell should be the same as the protections accorded to consumers receiving an outbound telephone call, regardless of whether the upsell is appended to an exempt telemarketing transaction or to a transaction subject to the Rule. As noted above, consumer advocates and the FTC's law enforcement experience confirm that upselling can be equally or more problematic, and thus sellers and telemarketers engaged in upselling should be required to provide the basic disclosures mandated by the Rule. In addition, there is no evidence to suggest that upsells should not be subject to any other part of the Rule (other than the "do-not-call" and calling time restrictions).

[191] CCC-NPRM at 12.

number in an initial transaction, the consumer in an upsell is afforded protection from deception or unauthorized billing.[192]

Other recommendations

Limitations to the definition of "upselling." Some commenters suggested that the definition of "upselling" be limited to "external upselling" transactions (i.e., where there are two different sellers in the two transactions).[193] They argued that any requirements that the Commission might apply to "upselling" should not include upsells made by or on behalf of the same seller.[194] However, the Commission believes that law enforcement experience indicates that "internal upsells" (where both transactions are by or on behalf of the same seller) have as much potential for deception and abuse as other types of telemarketing transactions that are subject to

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[192] Indeed, law enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information [in an initial transaction may actually result in greater risk of abuse during the second transaction. For example, in actions by the FTC and several states against Triad Discount Buying Service, Inc., and related entities, the Commission and the states alleged that the defendants crafted a marketing campaign designed to lure consumers to call solely for the purpose of upselling them. *See FTC v. Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). Specifically, the Commission and states alleged that the defendants ran an advertising campaign for a free product, inviting consumers to call a toll-free number. When they called, consumers were asked to provide account information to pay for shipping and handling for the free product, and then were upsold a "free trial" in a membership club or buyers club, that was then charged, without the consumer's knowledge or consent, to the account provided by the consumer to pay for the shipping of the first product. *See also* NAAG-NPRM at 30, n.73 (citing, among others such cases, *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592) and *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance)).

[193] ERA-NPRM at 9; NCTA-NPRM at 14.

[194] *Id.*

the Rule's requirements.[195] Therefore, the Commission has not adopted this suggestion.

Other commenters argued that the definition of "upselling" should not include upsells by "affiliates." [196] Still others made more specific requests to exempt banks, their affiliates and non-affiliated third parties who provide services on the banks' behalf or with whom the banks have joint marketing relationships; [197] to exempt agents or affiliates of common carriers; [198] and to exempt affiliates of insurance companies.[199] However, once again, there is scant support justifying such an approach. On the contrary, the record as a whole and law enforcement experience indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.[200]

The Commission has made it very clear that the Rule does not apply to entities or activities that fall outside the Commission's authority under the FTC Act, such as banks, savings associations and federal credit unions; regulated common carriers, and the business of insurance. However,

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[195] *See* NAAG-NPRM at 30, n.73, citing cases involving internal upsells, including but not limited to *Illinois v. Blitz Media, Inc.* (Sangamon County, Case No. 2001-CH-592); *Triad Discount Buying Serv., Inc.* [a/k/a *Smolev*] and related entities; and *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001).

[196] ABIA-NPRM at 5; AFSA-NPRM at 15; NFC-NPRM at 6.

[197] ABIA-NPRM at 5; MBA-NPRM at 3.

[198] SBC-NPRM at 2, 5, 8.

[199] PCIC-NPRM at 1-2.

[200] *See* NAAG-NPRM at 30, n.73 ("States have taken actions against companies using preacquired information as part of an upsell of membership programs or magazines. *See* note 188. See *also New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance)").

the Commission has also made it very clear that the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities. As the Commission stated in the SBP for the original Rule:

> The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.[201]

Clarification of "seller" in an upsell transaction. ERA and PMA recommended that the Commission clarify what is meant by "seller" in the context of upselling.[202] First, ERA and PMA suggested that "seller" be construed as the marketer who will submit the charge for payment against the consumer's account.[203] As ERA stated:

> [A] marketer might offer (and bill) a consumer for a product that it obtains on a wholesale basis from a manufacturer (in many instances, the marketer may not even take possession of the product, but rather have the manufacturer ship directly to the purchaser). Both the marketer and the manufacturer receive consideration in exchange for providing, or arranging for the other to provide, the product to the consumer. Thus, both entities are arguably 'sellers.' However, only the marketer will bill the consumer for the sale. As such, there should be

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[201] 60 FR at 43843.

[202] ERA-NPRM at 9-10; PMA-NPRM at 12-13. *See also* VISA-NPRM at 9 (requesting clarification of the term in all transactions, not just those involving upselling).

[203] ERA-NPRM at 10; PMA-NPRM at 13.

no need to identify both entities to the consumer. In fact it would likely be confusing to the consumer to do so.[204]

The Commission has retained in the amended Rule the definition of "seller," which states that a "seller" is "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."[205] The Commission believes that this definition makes clear that, for purposes of the Rule, a "seller" is not necessarily the manufacturer of a product, nor the sole financial beneficiary from its sale. Rather, the definition of "seller" is predicated upon a person's provision of goods or services—whether consummated, merely offered, or even simply "arranged for"—to the customer. Therefore, in the case of an upselling transaction, or, indeed, any telemarketing transaction, the marketer or other entity who provides, offers to provide, or arranges for the provision of the goods or services that are the subject of the offer would be the "seller" for purposes of the Rule.

Second, both ERA and PMA, as well as a number of other commenters, suggested that the Commission "clarify that affiliated entities do not constitute separate sellers."[206] To this end, ERA recommended looking to the Commission's Privacy of Consumer Financial Information Rule,[207] while PMA and NRF suggested using the standard laid out by the

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[204] ERA-NPRM at 11.

[205] Amended Rule § 310.2(z).

[206] ERA-NPRM at 10. *See also* June 2002 Tr. II at 222 (ATA); PMA-NPRM at 13; SBC-NPRM at 9.

[207] The Privacy of Consumer Financial Information Rule, 16 CFR 313.3(a), defines an affiliate as "any company that controls, is controlled by or is under common control with another company." (quoted in ERA-NPRM at 11).

FCC for "do-not-call" purposes.[208] NCL and AARP disagreed. NCL stated:

> We believe affiliates have to be treated as second sellers. They may be selling totally different products with different terms and conditions. Consumers don't have any way of knowing what is an affiliate of that company and what isn't, and ultimately it doesn't really matter to them because they need the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions, whether it's entirely a different seller or an affiliate of the original one.[209]

The Commission shares this viewpoint. As discussed above, the record in this matter, as well as law enforcement experience, indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements. For that reason, the Commission believes that affiliates should be treated as separate sellers for purposes of upsell transactions.

C. Section 310.3—Deceptive Telemarketing Acts or Practices.

Section 310.3 of the original Rule sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization before obtaining or submitting for payment a demand draft; prohibits false and misleading statements to

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[208] The applicable definition in the FCC's regulations is found at 47 CFR 64.1200(e)(2)(v). PMA-NPRM at 13 ("Thus, we suggest that corporate affiliates be exempt in those situations where the consumer would reasonably expect such affiliates to be related to the original seller."). *See also* June 2002 Tr. II at 217-18; and at 226-28 (NRF).

[209] June 2002 Tr. II at 221-22; and at 228 (AARP).

induce the purchase of goods or services; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions.

In the NPRM, the Commission proposed amendments to require that disclosures made pursuant to this section be made "truthfully;" require additional disclosures regarding prize promotions and in the sale of credit card loss protection plans; prohibit misrepresentations in the sale of credit card loss protection plans; expand the reach of the express verifiable authorization provision to include all methods of payment lacking certain key consumer protections; and make certain changes pursuant to the USA PATRIOT Act, which extends the coverage of the Rule to include the inducement of a charitable solicitation.

Based on the record in this proceeding, the Commission has determined to make additional modifications in the amended Rule. These changes, and the reasoning supporting the Commission's decisions, are set forth below.

§ 310.3(a)(1) —Required disclosures

Section 310.3(a)(1) of the original Rule requires the seller or telemarketer to disclose, in a clear and conspicuous manner, certain material information before a customer pays for goods or services offered.[210] The NPRM proposed to make a minor modification to the wording, by adding the word "truthfully" to clarify that it is not enough that the disclosures be made; the disclosures must also be true. The Commission received no comment on this proposed change, and therefore has determined to retain this additional wording in amended § 310.3(a)(1).

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[210] *See* ARDA-NPRM at 5 (noting that ARDA members support the current disclosures required by this section).

The few comments that the Commission received on § 310.3(a)(1) in response to the NPRM focused primarily on the timing of the required disclosures. AARP argued that, to be meaningful, the disclosures required by this section must be given before payment is requested, not merely before it is "collected."[211] According to AARP, "[s]uch infor-mation is key to making truly informed buying decisions," and so all the necessary disclosures should be given before a consumer is requested to pay for goods and services.[212] DOJ commented that the use of money-transmission services, rather than couriers, is increasingly popular in fraudulent telemarketing schemes, and recommended that the Commission amend the current footnote addressing the meaning of "before the customer pays" to state: "Similarly, when a seller or telemarketer directs a customer to use a money-transmission service to wire payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before directing the customer to take money to an office or agent of a money-transmission service to wire payment."[213]

In the SBP for the original Rule, the Commission noted that for a telemarketer to make the required disclosures "before a customer pays," the disclosures must be made "before the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or seller credit card or bank account information."[214] In the original Rule's TSR Compliance Guide, the Commission further clarified that the disclosures required by § 310.3(a)(1) must be made "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial

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[211] AARP-NPRM at 8.

[212] *Id.*

[213] DOJ-NPRM at 2.

[214] 60 FR at 4384.

payment. . . ." [215] The Guide goes on to say that "[a] seller or telemarketer also must provide the required information before requesting any credit card, bank account, or other information that a seller or telemarketer will or could use to obtain payment." [216] The Commission believes that its statements to date on the meaning of the term "before the customer pays" are sufficiently clear and declines to modify this provision.

§ 310.3(a)(1)(i) —Disclosure of total costs

Section 310.3(a)(1)(i) of the original Rule requires a seller or telemarketer to disclose the total costs to purchase, receive, or use the goods or services. As noted in the TSR Compliance Guide, "[i]t is sufficient to disclose the total number of installment payments, and the amount of each payment, to satisfy this requirement." [217] Some commenters in the Rule Review urged the Commission to require, in sales involving monthly installment payments, the disclosure of the total cost of the entire contract, not just the amount of the periodic installment.[218] In the NPRM, the Commission declined to modify the provision, but clarified that "the disclosure of the number of installment payments and the amount of each must correlate to the billing schedule that will actually be implemented. Therefore, to comply with the Rule's total cost disclosure provision, it would be inadequate to state the cost per week if the installments are to be paid monthly or quarterly." [219] The NPRM further noted that the best practice to ensure compliance with the clear and conspicuous standard governing all the § 310.3(a)(1) dis-

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[215] TSR Compliance Guide at 11.

[216] *Id.*

[217] *Id.* at 12.

[218] *See* 67 FR at 4502.

[219] *Id.*

closures is to "do the math" for the consumer, stating the total cost of the contract whenever possible.[220] The Commis-sion acknowledged that such a statement might not be possible in an open-ended installment contract, and stated that in such contracts, "particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand."[221]

In response to the NPRM, the Commission again received some comments urging that the Commission affirmatively mandate that, in installment sales contracts, the total cost of the contract be disclosed, rather than the number and amount of payments.[222] For example, LSAP opined that "it is illogical to maintain a provision that demands a subjective determine-ation of whether or not a disclosure meets a 'clear and conspicuous' standard when an objective and unambiguous standard can be adopted."[223] NACAA suggested that the Commission require disclosure of the total cost of the contract, noting that consumers do not always have the time or ability to "do the math" during a telemarketing call.[224] NCL concurred with LSAP and NACAA, and noted that since the seller or telemarketer would know the total contract price in an installment offer, it would impose no undue burden on industry members to mandate disclosure of the total contract price.[225]

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[220] *Id.*

[221] *Id.* at n.92.

[222] *See, e.g.*, LSAP-NPRM at 6-8; NACAA-NPRM at 7-8; NCL-NPRM at 3-4; NCLC-NPRM at 13.

[223] LSAP-NPRM at 7.

[224] NACAA-NPRM at 7-8 (citing, as an example of the harm that would persist absent such a provision, the sale of purportedly "free" magazines, for which consumers are billed exorbitant "shipping and handling" fees).

[225] NCL-NPRM at 3-4.

The Commission declines to adopt the recommendations to modify the total cost disclosure provision. The Commission believes that its interpretation, set forth in the NPRM, allows sellers and telemarketers the flexibility necessary to make a truthful and meaningful disclosure when goods or services are offered in conjunction with an open-ended installment agreement. The Commission's interpretation makes clear, however, that, at a minimum, the total number of payments and the amount of each must be clearly and conspicuously disclosed in order to satisfy the requirements of § 310.3(a)(1)(i). Although the Commission continues to believe that the best practice is for the telemarketer or seller to disclose the full amount of payments under of the contract whenever possible, it declines to impose such a requirement, which would be unworkable in the context of open-ended contracts, such as negative option plans.[226]

The Commission also declines to adopt the recommendation that the Commission explicitly state that for electricity sales, it is permissible to disclose the price per kilowatt hour.[227] The Commission recognizes that a vast number of goods and services can be sold through telemarketing, and believes it unnecessary to specify, for each, the specific terms that must be disclosed. Rather, the Commission believes that the language of § 310.3(a)(1)(i), which requires that the disclosure of total costs (among others) be made "truthfully, and in a clear and conspicuous manner," provides sufficient guidance for sellers who must make these disclosures, without necessitating explicit approval from the Commission for each of the myriad variations of "total cost" disclosures for the many kinds of goods and services sold through telemarketing. Therefore, § 310.3(a)(1)(i) is retained unchanged in the amended Rule.

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[226] *See* 60 FR at 43846 (noting that the total cost of a contract cannot be ascertained in negative option or continuity plans).

[227] *See* Green Mountain-NPRM at 7.

§ 310.3(a)(1)(ii) —Disclosure of material restrictions

Section 310.3(a)(1)(ii) requires the disclosure of "[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer." In response to the Rule Review, NAAG recommended that this provision explicitly state that the illegality of the goods or services offered is a material term. NAAG's concern arose out of the numerous cross-border foreign lottery scams in which U.S. citizens are offered the sale of foreign lottery chances.[228] The Commission declined to modify the Rule, stating its position that the term "material" is "sufficiently clear and broad enough to encompass the illegality of goods or services offered."[229]

In response to the NFRM, DOJ supported NAAG's reasoning, and recommended that the Commission add to § 310.3(a)(1)(ii) "a specific and unambiguous reference to the illegality of goods and services that the seller or telemarketer is offering," noting that such an amendment would enhance law enforcement and consumer education efforts regarding foreign lottery scams.[230] The Commission remains confident that the breadth of the term "material," as used in the Rule, would necessarily encompass the underlying illegality of goods or services offered in telemarketing.[231] Therefore, the Commission declines to modify the language in this provision and the amended Rule retains unchanged the original text of § 310.3(a)(1)(ii).

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[228] 67 FR at 4502-03.

[229] *Id.* at 4503.

[230] DOJ-NPRM at 3.

[231] As the Commission noted in the NPRM, the definition of "material" under the Rule comports with the Commission's Deception Statement and established Commission precedent. *See* 67 FR at 4503.

§ 310.3(a)(1)(iv) —Disclosures regarding prize promotions

Section 310.3(a)(1)(iv) requires that, in any prize promotion, a telemarketer must disclose, before a customer pays, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no-purchase/no-payment method of participating in the prize promotion. In the NPRM, the Commission proposed adding a disclosure that making a purchase will not improve a customer's chances of winning,[232] which would make the TSR's disclosure provision consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act of 1999 ("DMPEA").[233] After reviewing the record in this matter, the Commission has determined to amend the Rule by adding this disclosure requirement to two provisions: in § 310.3(a)(1) (governing all telemarketing calls), and in § 310.4(d) (governing outbound telemarketing).[234]

As noted in the NPRM, the Commission believes that this disclosure will prevent consumer deception. The legislative

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[232] 67 FR at 4503. Although NCL originally made this suggestion with respect to § 310.4(d), which governs oral disclosures required in outbound telemarketing calls, the rationale and purpose of the proposed disclosure applies with equal force to all telemarketing, as covered by § 310.3(a). See NCL-RR at 9. *See also* the discussion below in the section on sweepstakes disclosures within the analysis of § 310.4(d).

[233] 67 FR at 4503. The DMPEA is codified at 39 U.S.C. 3001(k)(3)(A)(II). *See also* "The DMA Guidelines for Ethical Business Practice," revised Aug. 1999, at http://www.the-dma.org/library/guidelines/dotherightthing.shtml#23 (Article #23, Chances of Winning). In this regard, it is noteworthy that the DMA's Code of Ethics advises that "[n]o sweepstakes promotion, or any of its parts, should represent . . . that any entry stands a greater chance of winning a prize than any other entry when this is not the case."

[234] *See* discussion below regarding the disclosure in § 310.4(d).

history of the DMPEA suggests that without such a disclosure, many consumers reasonably interpret the overall presentation of many prize promotions to convey the message that making a purchase will enhance their chances of winning the touted prize.[235] Such a message is likely to influence these consumers' purchasing decisions, inducing them to purchase a product or service they otherwise would not purchase just so they can increase their chances of winning. For this reason, the Commission believes that entities using these promotions must disclose that a purchase will not enhance the chance of winning, to ensure that consumers are not deceived.

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[235] *See* SEN. REP. NO. 106-102 (1999); and H. REP. NO. 106-431 (1999). Law enforcement actions since enactment of DMPEA further support this conclusion. For example, Publishers Clearing House ("PCH") agreed to settle an action brought by 24 states and the District of Columbia alleging, among other things, that the PCH sweepstakes mailings deceived consumers into believing that their chances of winning the sweepstakes would be improved by buying magazines from PCH. As part of the settlement, PCH agreed to include disclaimers in its mailings stating that buying does not increase the consumer's chances of winning, and pay $18.4 million in redress. In 2001, PCH agreed to pay $34 million in a settlement with the remaining 26 states. *See, e.g., Missouri ex rel. Nixon v. Publishers Clearing House*, Boone County Circuit Ct., No. 99 CC 084409 (2002); *Ohio ex rel. Montgomery v. Publishers Clearing House*, Franklin County Ct. of Common Pleas, No. 00CVH-01-635 (2001). Similarly, in 1999, American Family Publishers ("AFP") settled several multi-state class actions that alleged the AFP sweepstakes mailings induced consumers to buy magazines to better their chances of winning a sweepstakes. The original suit, filed by 27 states, was settled in March 1998 for $1.5 million, but was reopened and expanded to 48 states and the District of Columbia after claims that AFP had violated its agreement. The state action was finally settled in August 2000 with AFP agreeing to pay an additional $8.1 million in [damages. *See, e.g., Washington v. Am. Family Publishers*, King County Super. Ct., No. 99-09354-2 SEA (2000).

Commenters who addressed this proposal generally were supportive of adding the disclosure.[236] NAAG supported the additional disclosure, but asked the Commission to go further. First, NAAG suggested that any telemarketer using a prize promotion should be required to disclose the actual or estimated odds—not simply how the odds might be calculated.[237] Second, NAAG recommended that the original Rule's definition of "prize"[238] be made consistent with state laws and regulations, and the several multi-state settlements with large promotional sweepstakes companies.[239] Third, they recommended that the Commission track provisions in the recent settlements between the states and PCH, which would ensure that the means by which a consumer might enter a sweepstakes without making a purchase is not more difficult than if a purchase were made.[240] Each of these suggestions is discussed below.

As noted in the SBP for the original Rule, the Commission continues to believe that, in many instances, actual odds cannot be calculated in advance. In such circumstances, the Commission believes that requiring prize promoters to

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[236] ARDA-NPRM at 5; NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4; DOJ-NPRM at 3-4. *See also* June 2002 Tr. II at 105-15.

[237] NAAG-NPRM at 54. NACAA also recommended that the Commission require more specificity in the disclosure regarding the odds. NACAA-NPRM at 6-7; and discussion regarding the disclosure of odds, June 2002 Tr. II at 113-15. DOJ recommended that the Commission include a brief explanation in the Rule or in a footnote of what is meant by the phrase "the odds of being able to receive a prize," and clarify that the disclosure must give the odds for each prize. DOJ-NPRM at 3-4.

[238] Original Rule § 310.2(v).

[239] NAAG-NPRM at 54. NAAG recommended that "prize" be defined to be an item of value and that it not be an item that substantially all entrants in the promotion will receive.

[240] *Id.* at 54-55.

disclose "estimated" odds has greater potential for abuse than a disclosure of the method used to calculate those odds.[241] Furthermore, in many instances, such a requirement to disclose odds would reveal that virtually every entrant gets a "prize." The Commission believes that the better course is to require prize promoters to disclose the method by which odds are calculated. With regard to the suggestions to revise the definition of "prize" and the ease of entry for non-purchasers, the record provides no evidence on why the difference between a "prize" and a "free gift" would be material to consumers. The Commission believes that its authority to reach deceptive or unfair acts or practices under the FTC Act has been sufficient to address any deceptive prize promotions that have not been reachable under the Rule.[242] The Commission's requirements regarding prize promotion disclosures are not inconsistent and do not conflict with the more restrictive state laws. Therefore, the Commission declines to adopt NAAG's recommendations.

PMA maintained that the disclosure that making a purchase would not improve a customer's chances of winning was unnecessary and that there was no evidence on the record to support its addition to the Rule.[243] They suggested that the disclosure makes sense in the context of direct mail, but not in the types of representations more often found in

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[241] Ironically, requiring accurate disclosure of the odds of winning also is likely to subject some sellers and telemarketers to liability under the Rule for activity that does not cause consumer injury, since it is hard to imagine what harm is caused to consumers by *underestimating* the odds of winning.

[242] *See, e.g., FTC v. Landers*, No. 100-CV-1582 (N.D. Ga. filed June 22, 2000); *New World Bank Servs., Inc.*, No. CV-00-07225-GHK (C.D. Cal. filed July 5, 2001); *Global Network Enters., Inc.*, No. 00-625 (GET) (ANX) (C.D. Cal. 2001).

[243] PMA-NPRM at 4-8.

telemarketing.[244] Nonetheless, the PMA stated that, as a gesture of good faith, they would not oppose the change.[245]

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose before the customer pays, in any prize promotion, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the person's chances of winning, and the no-purchase/no-payment method of participating in the prize promotion.

§ 310.3(a)(1)(v)—Required disclosure of material costs in prize promotions

NACAA expressed concern that original and proposed Rule § 310.3(a)(1)(v) requires that a prize promoter disclose to consumers all "material costs or conditions to receive or redeem a prize that is the subject of the prize promotion" when there should be no costs to receive a prize.[246] NACAA suggests removing the "material costs" portion of subsection (v). The Commission agrees that there should be no costs to receive or redeem a prize. In fact, § 310.3(a)(1)(iv) requires a disclosure that "no purchase or payment is required to win a prize or to participate in a prize promotion." Moreover, § 310.3(a)(2)(v) prohibits misrepresentations "that a purchase or payment is required to win a prize or participate in a prize promotion." Thus the Rule is unequivocal in forbidding conditioning a "prize" on a payment or purchase. Section

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[244] *Id. See also* June 2002 Tr. II at 104-05.

[245] PMA-NPRM at 5, 7. *See also* June 2002 Tr. II at 106, 108 (PMA and ARDA, each stating that they do not oppose the disclosure). ARDA stated in its comment that, while it is inconvenient to include additional verbiage in a telephone call, it did not find the additional disclosure unduly burdensome. ARDA-NPRM at 5.

[246] NACAA-NPRM at 6-7 (pointing out that, if there are costs, then the "prize offer" becomes a sales pitch for add-ons, not a prize).

310.3(a)(1)(v) is intended to further clarify that any incidental cost that a consumer must incur—not merely a purchase or payment—must be disclosed in advance to avoid deception and to comply with the Rule. Despite NACAA's comment, the Commission does not believe there is any confusion regarding the role of this provision. Therefore, the Commission has determined to retain the original wording of this provision.

§ 310.3(a)(1)(vi) —Required disclosures in the sale of credit card loss protection

The telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud.[247] Telemarketers of credit card loss protection plans represent to consumers that these plans will limit the consumer's liability if his credit card is lost or stolen.[248] These telemarketers frequently misrepresent themselves as being affiliated with the consumer's credit card issuer, or misrepresent either affirmatively or by omission that the consumer is not currently protected against credit card fraud, or that the consumer has greater potential legal liability for unauthorized use of his or her credit cards than he or she actually does under the law.[249] In fact, federal law limits this liability to no more than $50.[250]

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[247] *See, e.g.*, NCL-NPRM at 6.

[248] Credit card loss protection plans are distinguished from credit card registration plans, in which consumers pay a fee to register their credit cards with a central party, who agrees to contact the consumers' credit card companies if the consumers' cards are lost or stolen.

[249] NCL-RR at 10. *See, e.g., FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. NCCP Ltd.*, No. 99 CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

[250] Under § 133 of the Consumer Credit Protection Act, the consumer's liability for unauthorized charges is limited to $50 when there is a

In the NPRM, the Commission proposed two new provisions to address this practice. The first provision—§ 310.3(a)(1)(vi)—requires the seller or telemarketer of credit card loss protection plans to disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. Since many consumers appear to be unaware of the protection they have, the Commission reasoned that a disclosure of the limits of their liability would deter many consumers from paying for protection that duplicates the free protection they already have under federal law. The second provision—§ 310.3(a)(2)(viii)—prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643.[251]

The Commission received little comment on these proposed provisions. Those commenters who addressed the disclosure provision strongly supported it, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.[252] In its NPRM comment, NCL reported that fraudulent solicitations for credit card loss protection plans ranked eighth among the most numerous

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signature involved. For transactions where no signature was involved (e.g., where the transaction did not take place face-to-face), the consumer has zero liability for unauthorized charges. 15 U.S.C. 1643.

[251] This approach parallels the Rule's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations of those facts are prohibited. See additional discussion below regarding § 310.3(a)(2)(viii).

[252] DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. *See also* June 2002 Tr. II at 104.

complaints to the NFIC in 2001.[253] The Commission's complaint-handling experience is consistent with that of NCL, with credit card loss protection plans continuing to be a source of consumer complaints. In its comment, NCL pointed out that fraud in the sale of credit card protection plans is particularly pernicious because it usually involves blatant misrepresentations and scare tactics about consumers' liability for lost or stolen credit cards.[254] Furthermore, the fraud is especially egregious because these schemes appear disproportionately to affect older consumers: in 2001, NCL reported, 55 percent of the victims of credit card loss protection plans were age 60 or older, while that age group accounted for only 26 percent of telemarketing fraud victims overall.[255] As noted in the NPRM, large numbers of complaints have prompted both the Commission and the state Attorneys General to devote substantial resources to bringing cases that challenge the deceptive marketing of credit card loss protection plans.[256]

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[253] NCL-NPRM at 6.

[254] *Id.*

[255] *Id.* In its Rule Review comment, NCL reported that in 1999, over 71 percent of the complaints about these schemes were from consumers over 50 years of age. NCL-RR at 10.

[256] *See, e.g., FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 (C.D. Cal. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs., Inc.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00 CV 0906A (SR) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Advanced Consumer Servs.*, No. 6-00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 23, 2000); *Capital Card Servs., Inc.* No. CIV 00 1993 PHX ECH (D. Ariz. filed Oct. 23, 2000); .*FTC v. First Capital Consumer Membership Servs., Inc.*, No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. Liberty Direct, Inc.*, No. 99-1637 (D. Ariz. filed Sept. 13, 1999); *FTC v. Source One Publ'ns, Inc.*, No. 99-1636 PHX RCP (D. Ariz. filed Sept. 14, 1999); *FTC v. Creditmart Fin. Strategies, Inc.*, No. C99-1461 (W.D. Wash. filed Sept. 13, 1999); *FTC v. NCCP Ltd.*, No. 99

NCL supported the Commission's decision to require disclosures and prohibit misrepresentations in the sale of credit card loss protection plans. However, NCL also recommended that the Commission go further and mandate requirements similar to those under the Credit Repair Organizations Act [257]—i.e., written disclosures regarding the consumer's rights, coupled with a written agreement or an agreement signed by the buyer who has three days to cancel.[258] The Commission believes that disclosures coupled with the prohibition against misrepresentation are appropriate and sufficient remedies to cure the problems associated with deceptive sales of credit card loss protection plans. The likely outcome of enforcement of these remedies is that consumers will decline to purchase such plans once they know that they duplicate free protection the law already provides them. The Commission will continue to monitor complaints regarding the sale of these plans to ensure that these provisions are adequate to remedy this problem.

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(1)(vi), to require that this information be disclosed.

CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *FTC v. S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *FTC v. Bank Card Sec. Ctr., Inc.*, No. 99-212-Civ-Orl-18C (M.D. Fla. filed Feb. 26, 1999); *FTC v. Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

[257] 15 U.S.C. 1679.

[258] NCL-NPRM at 6.

§ 310.3(a)(1)(vii)—Disclosures regarding negative option features

The amended Rule adds a new provision, § 310.3(a)(1)(vii), which requires sellers and telemarketers to disclose certain material information any time a seller or telemarketer makes an offer including any "negative option feature" as that term is defined under new § 310.2(t) of the amended Rule. This disclosure, like all of those listed in § 310.3(a)(1), must be made before a customer pays for goods or services. This new provision requires disclosure of all material terms and conditions of the negative option feature.

During the Rule Review, several commenters recommended that the Commission specifically address the problems associated with "free" or "trial" offers that include a negative option feature, particularly when the telemarketer already possesses the consumer's billing information.[259] These offers frequently are presented to consumers as "low involvement marketing decisions"[260] in which they are simply "previewing" the product or service. However, the Rule Review record, as well as federal and state law enforcement experience, show that consumers frequently are confused about their obligations in these transactions, mistakenly believing that, because they did not provide any billing information to the telemarketer, they are under no obligation unless they take some additional affirmative step to consent to the purchase.[261] As a result, such scenarios have

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[259] *See, e.g.* NACAA-RR at 2; NAAG-RR at 11-12, 16-17; NCL-RR at 5-6.

[260] NAAG-RR at 11.

[261] 67 FR at 4501, *citing FTC v. Triad Disc. Buying Serv., Inc.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va.

resulted in significant abuse as consumers discover they have been charged for something they did not realize they had been deemed to have consented to purchase.[262]

In the NPRM, the Commission proposed a broad prohibition on the receipt or disclosure of a consumer's billing information from any source other than the consumer herself. This expansive approach would have obviated the need for a more narrowly-tailored remedy specifically addressing negative options.[263] The Commission believed that without preacquired account information, telemarketers' ability to exploit the negative option scenario to bill charges to consumers' accounts without their knowledge or consent would have been eliminated. The seller or telemarketer would have been required to obtain the account information directly from the consumer, thus putting the consumer on notice that he is agreeing to purchase something.[264]

Based on the entire record in this proceeding, however, the Commission has determined that a blanket prohibition on preacquired account telemarketing sweeps too broadly, curtailing much activity that has not generated a record of consumer harm. As explained in detail below in § 310.4(a)(6) of

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filed May 31, 1997). To this list may be added several more law enforcement actions, including but not limited to actions by state [Attorneys General against BrandDirect Marketing Corp. (Assurances of Discontinuance with the States of Connecticut and Washington); Cendant Membership Services (Consent Judgment with State of Wisconsin); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York); *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance), and additional actions by New York and California against MemberWorks, and by New York against Damark Int'l. *See* NAAG-NPRM at 30, n.73.

[262] *See* 67 FR 4513-14, *citing* NAAG-RR at 11-12.

[263] *Id.* at 4514.

[264] *Id.* at 4512-14.

this SBP, the Commission has refocused this aspect of the amended Rule on the core problem of preacquired account telemarketing, which is to ensure that a customer's consent is obtained before charges are billed to the customer's account, regardless of the source from which the seller or telemarketer obtained the customer's billing information. Therefore, the amended Rule contains a new provision, § 310.4(a)(6), that prohibits charging a customer's account without the customer's express informed consent. As a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a new solution to the problems associated with negative option features is also required.

The amended Rule now takes a two-pronged approach to remedying the harms associated with offers involving negative option features, either alone or in combination with preacquired account telemarketing. Although the record shows that the greatest consumer injury occurs when these two practices occur together,[265] each practice can, and often does, occur without the other,[266] and both, alone or in combination, can be problematic for consumers. Thus, the amended Rule sets forth separate requirements specific to each practice—disclosure requirements for offers with a negative option feature, in § 310.3(a)(1)(vii); and, separately, consent requirements for offers where the telemarketer

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[265] *See* discussion of § 310.4(a)(6) below.

[266] For example, the seller or telemarketer of a magazine or newspaper subscription, who does not have preacquired account information, may make an offer for a subscription that includes an automatic annual renewal by obtaining account information or payment directly from the consumer in the initial transaction. Or, as noted in the NPRM, a customer may have an ongoing relationship with a particular contact lens retailer, in which he expects the retailer to retain account information for future similar purchases, none of which involve a negative option feature. *See* 67 FR 4513, n.196.

possesses preacquired account information, in § 310.4(a)(6). The application of these two separate provisions depends on the details of the transaction, thus addressing with greater precision different potential telemarketing scenarios.

Commenters stressed one issue: the need for consumers to clearly understand and consent to the precise terms of the negative option feature of an offer.[267] The problematic aspect of an offer with a negative option feature is that the consumer's inaction—not an affirmative action taken by the consumer—is deemed to signal acceptance (or continuing acceptance) of an offer for goods or services. By accepting the initial offer (e.g., to try a membership in a buying club service for 30 days, or to receive a daily newspaper for six months) and doing nothing further, the consumer actually contracts to pay for something more (e.g., an automatic annual membership fee or long-term newspaper subscription renewal). In these circumstances, it is crucial that consumers clearly understand the precise terms of such a negative option feature before they agree to accept the initial "free offer" or purchase, since this agreement subjects them to continuing charges, often long-term, if they fail to understand that they must take action to decline the offer or terminate the agreement.

Therefore, new § 310.3(a)(1)(vii) requires that the following disclosures must be made if an offer includes any negative option feature, as that term is defined under § 310.2(t): (1) the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s); (2) the date(s) the charge(s) will be submitted for payment; and (3) the specific steps the customer must take to

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[267] NACAA-RR at 2; NAAG-RR at 11-12; NCL-RR at 5-6; NAAG-NPRM at 32-33. *See also* ERA-NPRM at 2-3, 16; June 2002 Tr. II at 209-10 (ERA).

avoid the charge(s).[268] As noted above in the discussion of § 310.2(t) defining "negative option feature," that term is intended to reach any provision under which a consumer's failure to take affirmative action to reject the goods or services will be deemed by the seller to constitute acceptance (or continuing acceptance) of goods or services. Thus, the term includes, but is not limited to, "free-to-pay conversions," automatic renewal offers, and continuity plans.[269]

The required material disclosures must be made truthfully, and in a clear and conspicuous manner, before a customer pays.[270] Under the amended Rule's treatment of preacquired account telemarketing,[271] "before a customer pays" shall be construed as meaning before a customer provides express informed consent to be charged for the goods or services offered, and to be charged using a specifically identified account.[272] Thus, § 310.3(a)(1)(vii), and indeed, all of § 310.3(a)(1), must be read in conjunction with new § 310.4(a)(6), which prohibits any seller or telemarketer from

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[268] These disclosures are similar to those required in the Commission's Rule concerning "Prenotification Negative Option Plans." *See* 16 CFR 425.2(a)(1).

[269] Each of these terms describes a form of negative option feature, as discussed in this SBP at § 310.2(t), regarding the definition of "negative option feature," and § 310.2(o), regarding the definition of "free-to-pay conversion."

[270] 16 CFR 310.3(a)(1).

[271] The Commission has determined to include provisions prohibiting the disclosure, for consideration, of unencrypted account information for use in telemarketing in § 310.4(a)(5), and prohibiting unauthorized billing in § 310.4(a)(6) of the amended Rule. As explained below in the discussion of these new provisions, these provisions address the harm caused by sellers or telemarketers who possess preacquired account information, as well as the broader abuse of charging a consumer's account without the consumer's express informed consent, regardless of the nature of the telemarketing transaction.

[272] *See* discussion of § 310.4(a)(6) below.

causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer.

§ 310.3(a)(2)—Prohibited misrepresentations in the sale of goods or services

Section 310.3(a)(2) in the original Rule prohibits a seller or telemarketer from misrepresenting certain material information in a telemarketing transaction, including: total cost; any material restrictions; any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered; any material aspect of the seller's refund policy; any material aspect of a prize promotion; any material aspect of an investment opportunity; and a seller's or telemarketer's affiliation with, or endorsement by, any governmental or third-party organization.[273]

In the NPRM, the Commission proposed three changes to the provision. First, the phrase "in the sale of goods or services" was added to the section to clarify that these prohibited misrepresentations apply only in that context. This change was made because, pursuant to the mandate of the USA PATRIOT Act, the Commission proposed adding to the Rule § 310.3(d), which delineates misrepresentations prohibited in the specific context of charitable solicitations. Second, § 310.3(a)(2)(vii) was modified slightly to conform with proposed § 310.3(d)(7) which is an almost identical provision, but in the charitable solicitation context. Finally, the Commission proposed an additional prohibited misrepresentation regarding credit card loss protection plans.[274]

The Commission received no comments regarding the first two changes, and thus retains these in the amended Rule.

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[273] *See* 16 CFR 310.3(a)(2).

[274] Proposed Rule § 310.3(a)(2)(viii).

§ 310.3(a)(2)(viii)—Misrepresentations regarding credit card loss protection plans

As discussed in detail above, the telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud and, as a result, has been the target of numerous law enforcement actions by both the Commission and the state Attorneys General.[275] In the NPRM, the Commission proposed two new provisions to address this practice. The first provision, in § 310.3(a)(1)(vi), discussed above, requires that sellers or telemarketers of such plans disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. This provision is retained unchanged in the amended Rule.

In addition to advising consumers of their rights, the Commission also believes that additional protection is needed to curb the misrepresentations that are prevalent in the sale of credit card loss protection plans. Telemarketers often misrepresent various aspects of the credit card loss protection plan to consumers, especially the existing legal limits on consumer liability if their cards are lost or stolen.[276] Therefore, the Commission proposed to add a second provision—§ 310.3(a)(2)(viii)—which prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643, which limits a cardholder's liability for unauthorized charges.[277]

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[275] *See* note 256 above.

[276] *See* discussion of § 310.3(a)(1)(vi) above, and notes 249 and 253.

[277] As noted above, this approach parallels the TSR's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case,

The Commission received little comment on this proposed provision. Those commenters who addressed the Commission's proposal strongly supported the provision's method of addressing problems with these plans, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.[278] Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to misrepresent that any customer needs particular goods or services in order to have protections provided pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(2)(viii), which prohibits a seller or telemarketer from misrepresenting that any consumer needs to purchase protections that they already have under 15 U.S.C. § 1643.

§ 310.3(a)(2)(ix)—Misrepresentations regarding negative option feature offers

The original Rule did not specifically require disclosures or prohibit misrepresentations regarding negative option features in telemarketing offers. However, as noted above, in the discussion of § 310.3(a)(1)(vii), as a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a newly focused approach to the problems related to negative option features is also required. This includes specific disclosure requirements, which are set forth in § 310.3(a)(1)(vii) and explained above. Consistent with the structure of the Rule to date, and to ensure that the disclosures are not only made, but made truthfully, the amended Rule includes a mirroring provision to these disclosure requirements, at § 310.3(a)(2)(ix), which

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material facts must be disclosed, and misrepresentations of those facts are prohibited.

[278] DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. *See also* June 2002 Tr. II at 104; and discussion of § 310.3(a)(1)(vi) above.

prohibits misrepresentations regarding "[a]ny material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)."

§ 310.3(a)(3)—Express verifiable authorization

Section 310.3(a)(3) of the original Rule requires that a seller or telemarketer obtain express verifiable authorization in sales involving payment by demand drafts or similar negotiable paper.[279] The Rule also provides that authorization is deemed verifiable if any of three specified means are employed to obtain it: (1) express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment. If the telemarketer chooses to use the taped oral authorization method, the Rule requires the telemarketer to provide, upon request, tapes evidencing the customer's oral authorization, including the customer's receipt of the following information: the number, date(s) and amount(s) of payments to be made; date of authorization; and a telephone number for customer inquiry that is answered during normal business hours.[280]

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[279] The use of demand drafts, or "phone checks," enables a merchant to obtain funds from a person's bank account without that person's signature on a negotiable instrument.

[280] *See* original Rule § 310.3(a)(3). Section 310.3(a)(3)(iii)(A) of the original Rule requires that all information required to be included in a taped oral authorization be included in any written confirmation of the transaction.

In the NPRM, the Commission proposed to amend the express verifiable authorization provision to require that the seller or telemarketer obtain the customer's express verifiable authorization in any telemarketing transaction where the method of payment lacks the protections provided by, or comparable to those available under, the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA"). In addition, the proposed amendment would have required that the customer receive two additional pieces of information in order for authorization to be deemed verifiable: the name of the account to be charged and the account number, which would have been required to have been recited by either the customer or donor, or the telemarketer. The Commission also proposed to delete § 310.3(a)(3)(iii), which allowed a seller or telemarketer to obtain express verifiable authorization by confirming a transaction in writing, provided the confirmation was sent to the customer prior to the submission of the customer's billing information for payment. Finally, the Commission proposed in the NPRM, pursuant to the USA PATRIOT Act, to bring charitable contributions within the coverage of the express verifiable authorization provision.[281]

Based on the record in this proceeding, the Commission has decided to modify the proposed express verifiable authorization provision. The amended Rule prohibits "[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the TILA and Regulation Z,[282] or a debit card subject to the protections of the Electronic Fund Transfer Act

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[281] Proposed Rule § 310.(3)(a)(3), 67 FR at 4542.

[282] TILA, 15 U.S.C. 1601 *et seq.* (including the FCBA amendments, at 15 U.S.C. 1637 *et seq.*), and Regulation Z, 12 CFR part 226.

("EFTA") and Regulation E."[283] This modified language draws a "bright line" to simplify compliance. The amended Rule retains the express written authorization and oral authorization provisions (§§ 310.3(a)(3)(i) and (ii) of the original and proposed Rules), with slight modifications, and has reinstated the provision of the original Rule allowing written confirmation, with certain additional requirements and limitations.

In addition, certain modifications to this express verifiable authorization provision have been adopted in the amended Rule pursuant to the mandate of the USA PATRIOT Act. First, where the term "customer" appeared in the original Rule, that term has been replaced in the amended Rule with the phrase "customer or donor" (including, where applicable, the plural form). Similarly, where the phrase "goods or services" had been used in the Rule, it has been replaced with the phrase "goods or services or charitable contribution" to reflect the expansion of the Rule to cover charitable solicitations. And, the term "telemarketing transaction" has been substituted for the term "sales offer," again to reflect the expansion of the provision to cover authorization in the context of a charitable solicitation.

The Commission received numerous comments addressing the proposed amendments to § 310.3(a)(3). In addition, the topic was the subject of extensive discussion at the June 2002 Forum.[284] The major themes that emerged from the record are summarized below.

Express verifiable authorization for novel payment methods. In the NPRM, the Commission noted two separate rationales in support of the requirement that a customer's express verifiable authorization be obtained any time the

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[283] EFTA, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[284] *See* June 2002 Tr. III at 4-52.

payment method used lacks certain protections against unauthorized charges and fails to provide dispute resolution rights. First, the Commission stated its belief that the use of novel payment methods may lead to unauthorized billing.[285] If consumers fail to understand that a telemarketer has the ability to place a charge using a novel payment method (such as utility or mortgage account billing), based on this misperception, they may be induced to divulge billing information that enables such charges. Second, the Commission noted that many emerging payment methods lack both dispute resolution rights and protection against unlimited liability for unauthorized charges.[286] These two facts—that consumers can be charged unwittingly by means of novel payment methods and that the resulting injury due to unauthorized charges is magnified when dispute resolution procedures and liability limits are absent—persuaded the Commission that it was appropriate to require express verifiable authorization when protections pursuant or comparable to TILA and FCBA are absent.[287]

Comments on the requirement for express verifiable authorization in novel payment method scenarios were many and varied. Some industry commenters—with the notable exception of DialAmerica—rejected the notion that novel payment methods should be subject to more stringent requirements under the Rule, arguing that, as long as the consumer has a clear understanding that he or she is purchasing a particular product or service and that the purchase will be charged to a particular account, nothing

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[285] *See* 67 FR at 4507. This concern was also articulated by the Commission in the original rulemaking in connection with the use of demand drafts as a payment method. 60 FR at 43850-51.

[286] *See* 67 FR at 4507.

[287] *Id.*

further should be required of the telemarketer.[288] NACHA advocated scaling back the proposed express verifiable authorization requirement, which it argued was "overly broad" in its coverage of payment methods, such as debit cards, with protections comparable to TILA and FCBA.[289] EFSC noted its concern that emerging payment methods would be disadvantaged because they would be subject to the express verifiable authorization provision.[290]

NAAG, on the other hand, supported the Commission's proposed approach.[291] Some consumer groups urged the Commission to take an even more stringent approach than it did in the NPRM, and require express verifiable authorization in all telemarketing transactions. For example, NCL argued that since most telemarketers use audio recordings to verify

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[288] *See, e.g.*, Aegis-NPRM at 4; Green Mountain-NPRM at 27 ("there is little danger that consumers will give their [debit card] account numbers to telemarketers without knowing that their accounts will be debited"); ITC-NPRM at 5; NATN-NPRM at 4; Noble-NPRM at 4; NSDI-NPRM at 4; and Technion-NPRM at 5. *But see* June 2002 Tr. III at 22 (Dial-America representative noting that his company declines to use novel payment methods because it "had experience with charging people's bank accounts and [ ] also [with] LEC billing, and they have not been good experiences.").

[289] NACHA-NPRM at 2.

[290] EFSC-NPRM at 7. *See also* NATN-NPRM at 4; June 2002 Tr. III at 39. The Commission notes that it was in part because of this concern that the original Rule did not require written authorization in every instance for demand drafts. *See* 60 FR at 43850-51. The amended Rule's allowance for obtaining express verifiable authorization by any of three means, including written confirmation, should obviate concerns about the burden imposed on sellers who choose to accept novel payment methods. Further, the Commission believes, for the reasons stated above, that it is precisely when such novel methods—unfamiliar to the consumer and devoid of legally-mandated consumer protections—are used that express verifiable authorization of a consumer's acquiescence to the transaction is critical.

[291] *See* NAAG-NPRM at 48.

authorizations anyway, it would hardly be burdensome to require express verifiable authorization, which can be evidenced by such a recording, in every instance.[292] In support of this position, NCL offered statistics showing that complaints to the NFIC for 2001 show that 60 percent of the payments for fraudulent buyers club offers—a "category in which nearly all of the consumers said they never agreed to purchase the service"—were made by credit card.[293] According to NCL, even when the payment method used by consumers may be subject to legal protections, "all consumers whose accounts will be billed should have the basic protections that such [express verifiable authorization] provides.[294] LSAP concurred, suggesting that the Rule would better serve all consumers if express verifiable authorization were required in every purchase.[295] Similarly, NCLC urged the Commission to extend the express verifiable authorization requirements to cover all transactions, or at least those not subject to the protection of FCBA and TILA.[296]

The Commission declines to require in every transaction that a seller or telemarketer obtain the express verifiable authorization of a customer or donor prior to submitting billing information for payment. As it made clear in the original rulemaking, the Commission believes that the burden of requiring express verifiable authorization is justified in limited circumstances; namely, when consumers are unaware that they may be billed via a particular method, when that

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[292] NCL-NPRM at 5.

[293] *Id.*

[294] *Id.* (noting that even when legal protections exist to protect consumers from unauthorized charges, consumers must still bear the burden to "contest the charges in the required manner and time frame to assert their rights"); *see also* LSAP at 10.

[295] LSAP-NPRM at 9-11.

[296] NCLC-NPRM at 8.

method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights.[297] However, the Commission agrees that consumers could benefit from a more explicit Rule provision mandating what should be obvious: a transaction is valid only when the telemarketer has obtained the consumer's express informed consent to be charged, and to be charged using a particular account. Therefore, as is discussed in detail below, new § 310.4(a)(6) of the Rule explicitly requires, in every telemarketing transaction, that the seller or telemarketer obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution that is the subject of the transaction. This more explicit treatment will achieve the goals of consumer groups without unduly burdening industry members with the recordkeeping required by the express verifiable authorization provision.

The comments from consumer groups addressing the express verifiable authorization issue opposed the "comparability" standard set out in the proposed amended Rule, *i.e.*, the provision which would have exempted from the requirement to obtain express verifiable authorization any payment method with protections comparable to those available under FCBA and TILA. Some commenters stated that it would be too difficult for merchants to determine, during the course of each telemarketing transaction, whether a given payment method had protections comparable to those

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[297] *See* 60 FR at 43850-51. The Commission notes that despite its request for detailed evidence regarding the cost of obtaining express verifiable authorization and the prevalence of each of the three methods allowed by the original Rule, *see, e.g.*, 67 FR 4537; June Tr. III at 32, there remains a dearth of specific record evidence regarding such costs. Industry commenters who did address the cost merely stated that creating and maintaining audio recordings of express verifiable authorization was "expensive." *See, e.g.*, Capital One-NPRM at 7; June Tr. III at 38 (CCC).

available under TILA.[298] NCL and NCLC argued that the impermanent nature of voluntary policies, such as the "zero liability" guarantees made by MasterCard and VISA, makes them a poor substitute for legal protection.[299] NCLC further argued that such an amendment would "invite sham internal review procedures,"[300] thereby making it deleterious to consumers, by placing the power of determining which transactions required express verifiable authorization in the hands of the merchant.[301]

Industry commenters, on the other hand, urged the Commission to clarify that "comparable protection," whether in the form of a business rule or private contract, should be sufficient to relieve sellers and telemarketers of requirement to obtain express verifiable authorization.[302] In this regard, some industry commenters noted the "zero liability" protection for unauthorized charges provided by the two main issuers of debit cards, VISA and MasterCard, as a voluntary initiative.[303] MasterCard and VISA noted that their respective "zero liability policies" provided greater protection to cardholders than is provided by federal law.[304] Similarly,

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[298] *See* NCLC-NPRM at 2, 4 (noting the exemption from express verifiable authorization for methods of payment with protections comparable to TILA and FCBA "essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue. . ."). Some industry members also noted that the comparability standard was too vague to be useful. *See, e.g.*, CMC-NPRM at 12; EFSC-NPRM at 4 (noting that the vagueness could inhibit the use of novel payment methods).

[299] *See* NCL-NPRM at 5; NCLC-NPRM at 8.

[300] NCLC-NPRM at 7.

[301] *See* NCLC-NPRM at 4-5.

[302] *See, e.g.*, ABA-NPRM at 7-8; BofA-NPRM at 6; Capital One-NPRM at 7; Citigroup-NPRM at 10; DMA-NPRM at 56-57.

[303] *Id.*

[304] *See* MasterCard-NPRM at 4; VISA-NPRM at 5. The Commission notes, however, that the "zero liability" protection offered by MasterCard

Fleet urged the Commission to take note of the unauthorized use liability provisions that VISA and MasterCard offer for debit cards.[305] Other commenters requested that the Commission explicitly state that certain other protections are "comparable."[306]

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and VISA does not come into play in all circumstances. For example, MasterCard extends this protection only to a consumer whose account is in good standing and who has not reported two or more instances of unauthorized use in the past year. *See* http://www.mastercard.com/general/zero—liability.html. VISA offers its coverage only for "VISA credit and debit card transactions processed over the VISA network," and allows the financial institution that issued the card to determine liability for transactions processed over other networks. See http://www.usa.visa.com/personal/secure—with—visa/zero—liability.html?it=f2—/personal/secure—with—visa/.

[305] *See* Fleet-NPRM at 5. *See also* KeyCorp-NPRM at 5; June Tr. III at 11 (DMA) (endorsing voluntary protections).

[306] *See* Capital One-NPRM at 7 (exempt transactions subject to the UCC); CMC-NPRM at 12 (state that protections under the Real Estate Settlement Procedures Act ("RESPA") and EFTA are comparable to those under the FCBA and TILA); Fleet-NPRM at 5 (exempt transactions where the goods or services are subject to a "liberal refund policy"); KeyCorp-NPRM at 5 (exempt transactions subject to the UCC); NACHA-NPRM at 2 (exempt transactions subject to the NACHA Rules); VISA-NPRM at 5 (exempt transactions subject to UCC when the revisions to Article 4 are complete). The Commission declines, at this time, to exclude from the express verifiable authorization requirement transactions subject to RESPA. While the Commission recognizes that RESPA provides important protections for consumers, it does not believe that most real estate transactions would be subject to the TSR at all. And, in instances of mortgage billing, which *would* be subject to the Rule, the Commission believes that consumers, unfamiliar with this method of billing for anything other than their mortgage payment, need the protections of the express verifiable authorization provision. The Commission also declines to exclude transactions subject to the UCC from the requirements of express verifiable authorization, but may revisit this issue when modifications to the UCC are completed. The Commission also declines to exempt transactions subject to the NACHA Rules or for which the seller provides a liberal refund policy, believing that it is preferable to

Based on the record evidence, the Commission has decided to eliminate the "comparability" language from the express verifiable authorization provision. The comments made clear that it is far more desirable to implement a "bright line" rule in this instance to avoid the costs to businesses and consumers of requiring a telemarketer to make a real-time determination of whether a payment method provides adequate protection while on the telephone with a consumer. Moreover, the Commission is persuaded that the impermanent nature of voluntary consumer protections makes them ill-suited as a predicate for circumventing the express verifiable authorization provision.[307] Therefore, the amended Rule requires express verifiable authorization in all transactions where payment is made by a method other than a debit card subject to Regulation E, or a credit card subject to Regulation Z.

Several industry commenters specifically urged the Commission to ensure that express verifiable authorization not be required when a consumer uses a debit card to pay for goods and services offered, or a charitable contribution solicited, through telemarketing. Commenters raised several arguments in support of this position. First, commenters noted that debit cards are not "novel" payment methods.[308] Commenters contended that, on the contrary, debit cards are widely accepted and used by consumers, who understand that by providing their debit card number in a telemarketing transaction, the account with which the card is associated will

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limit exemptions and thus maintain a "bright line" rule to simplify compliance.

[307] *See* June 2002 Tr. III at 29 (NCL) (noting receipt of complaints about the enforceability of these voluntary protections).

[308] *See, e.g.*, ABA-NPRM at 6; DMA-NPRM at 57; and ERA-NPRM at 47.

be debited.[309] Second, commenters argued that debit cards are subject to the protections of the EFTA and its implementing regulation, Regulation E, which provide similar, although not identical, protection to that available under TILA.[310] Third, commenters argued that distant sellers cannot distinguish between a debit and credit card until, in the best case scenario, the consumer reads the entire number.[311] Finally, commenters noted that VISA has an "honor all cards" policy that would prohibit a merchant from declining to accept VISA-branded debit cards if it accepted VISA-branded credit cards.[312] These commenters contended that the practical result

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[309] *See, e.g.*, Collier Shannon-NPRM at 16; Green Mountain-NPRM at 27; June 2002 Tr. III at 24 (ERA).

[310] *See, e.g.*, ABA-NPRM at 2-7; AFSA-NPRM at 18-19; BofA-NPRM at 5-6; Citigroup-NPRM at 10; Collier Shannon-NPRM at 11; KeyCorp-NPRM at 5; MasterCard-NPRM at 4; NACHA-NPRM at 2. Some commenters suggested that any method of payment subject to Regulation E be exempted from the express verifiable authorization requirements. *See* Citigroup-NPRM at 10 (exempt all electronic fund transfers, including wire transfers); EFSC (exempt automated clearinghouse ("ACH") transactions, as well as other novel payments, such as prepaid smart cards). The Commission declines to exempt all electronic fund transfers subject to Regulation E. The record does not support exclusion of other methods of payment subject to Regulation E; and the Commission believes that, despite any consumer protections available, many emerging payment methods covered by Regulation E are still relatively unknown to consumers who will thus benefit from express verifiable authorization when these payment methods are used.

[311] BofA-NPRM at 6; Collier Shannon-NPRM at 6 ("Merchants who process credit and debit card transactions over the phone do not have the ability to differentiate between credit cards and debit cards."); ERA-NPRM at 48; June 2002 Tr. III at 11 (DMA) (noting that "it is impossible for a marketer to know whether it's a debit card or a credit card, in the best instance, until after the entire number has been given"); June 2002 Tr. III at 18 (NRF) (stating that "remote sellers cannot distinguish a debit card from the credit card with any great degree of reliability pre-purchase").

[312] June 2002 Tr. III at 19-20 (NRF) (noting that VISA and MasterCard "have what's called an Honor-All-Cards rule" that requires that merchants

of requiring express verifiable authorization for debit cards would be that express verifiable authorization would have to be obtained in all transactions—whether payment was made by credit or debit card, demand draft, or any other method.[313]

Based on the extensive record on this issue, and on the Commission's law enforcement experience, the Commission has determined to modify the express verifiable authorization provision in the amended Rule. The Commission is persuaded that debit cards should not be subject to the express verifiable authorization provision, based on their wide consumer acceptance and the fact that they are subject to the protections of the EFTA and Regulation E. The Commission believes that debit cards are so commonly used that it cannot persuasively be argued that consumers do not understand that when they provide their debit card account number to a telemarketer, their account can be debited by using that number.[314] Moreover, the Commission is persuaded that the

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accept any card branded with these issuers' logos as a condition of being able to accept the VISA and MasterCard branded credit cards).

[313] Collier Shannon-NPRM at 6-7; June 2002 Tr. III at 11 (DMA) (noting that "[i]n some instances you don't even know [whether a number provided by a consumer is for a debit or credit card] when the number is given, which would force marketers to have express verifiable authorization for everything. . ."). Some commenters argued that such a provision would have the effect of eliminating or reducing the use of debit cards as a form of payment. *See* Gannett-NPRM at 1-2; Intuit-NPRM at 19.

[314] This is not to say, of course, that an unscrupulous telemarketer could not misrepresent the purpose for which it needed such an account number, leading to consumer injury. Section 310.3(a)(4) of the Rule, which prohibits making a false or misleading statement to induce any person to pay for goods or services, would come into play in such situations. Moreover, the record and the Commission's consumer protection experience suggest that, while consumers do understand that their debit cards can be used as a method of payment, it is not clear that consumers understand the varying degrees of consumer protection afforded by credit versus debit cards. *See* June 2002 Tr. III at 24-25. The

practical result of requiring express verifiable authorization when a consumer pays using a debit card would be to require it in all instances when a debit or credit card is used, because it is not currently possible to distinguish these methods in a distance transaction.[315]

Regulation E provides protections that are similar, though not identical, to those provided under TILA. Some commenters argued that express verifiable authorization should be required for debit cards because Regulation E's three-tiered liability scheme for unauthorized use, with increasing liability when the unauthorized use is reported after two business days, is less advantageous for consumers than the TILA protections, which cap a consumer's losses, in all instances, at $50.[316] The Commission believes that this disparity will not disadvantage consumers who face unauthorized charges pursuant to a telemarketing transaction. Both Regulation Z and Regulation E provide that, in a situation where the consumer retains control of the card, no liability shall attach; Regulation Z does so unconditionally,[317] while Regulation E provides such protection on condition that the consumer reports the unauthorized charge within 60 days of transmittal of the consumer's statement.[318] The Commission

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Commission has issued consumer education materials to reinforce the material differences in protection under federal law for debit and credit cards. *See, e.g.*, FTC Facts for Consumers, Credit, ATM and Debit Cards: What to do if They're Lost or Stolen, http:// www.ftc.gov/bcp/conline/pubs/credit/atmcard.htm.

[315] *See* note 311 above.

[316] Compare Regulation E, 12 CFR 205.6(b) to Regulation Z, 12 CFR 226.12(b).

[317] *See* Regulation Z, 12 CFR 226.12(b)(2)(iii), Official Staff Interpretation, Suppl. I.

[318] *See* Regulation E, 12 CFR 205.6(b)(3). The 60-day notification period is somewhat flexible. Section 205.6(b)(4) notes that "[i]f the consumer's delay in notifying the financial institution was due to

believes that, despite the reporting requirement imposed by Regulation E, consumers who face unauthorized charges due to telemarketing fraud have important fundamental protections whether they use a debit or credit card. The Commission will continue its campaign to educate consumers about their varying obligations in reporting unauthorized charges involving both debit and credit cards, and will monitor the effectiveness of this provision from the implementation of the amended Rule through the next Rule Review, making any modifications as necessary.

The record reflects a variety of viewpoints on whether dispute resolution rights are essential to the determination of whether a payment method should be excluded from the requirement of obtaining express verifiable authorization.[319] The Commission continues to believe that dispute resolution protection is a key predicate for excluding a payment method from coverage under the express verifiable authorization provision, to ensure that consumers are not unduly burdened during the investigation of any claim of unauthorized billing. The Commission believes that, although the substantive dispute resolution protections of Regulation E are somewhat less extensive than those of Regulation Z,[320] the core

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extenuating circumstances, the institution shall extend the [time limit] to a reasonable period."

[319] *See* ABA-NPRM at 5, 7 (encouraging the Commission to delete from the express verifiable authorization provision the requirement that any exempt payment mechanism include dispute resolution procedures); Collier Shannon-NPRM at 11-15 (noting that the dispute resolution protections under Regulations E and Z are similar).

[320] For example, unlike Regulation Z, Regulation E does not provide that a consumer may assert against a financial institution all claims (other than tort) and defenses arising out of the transaction and relating to the failure to resolve the dispute. *See* Regulation Z, 12 CFR 226.12(c). However, Collier Shannon argued that, in some instances, Regulation E provides greater consumer dispute resolution rights. For example, Collier Shannon noted that investigations under Regulation E must be completed

protections provided by Regulation E—allowing a consumer to report an unauthorized electronic fund transfer and to receive a provisional credit of the disputed amount within ten business days of the financial institution's receipt of such notice—will afford sufficient basic protection to consumers who choose to use debit cards to pay for goods or services or charitable contributions in telemarketing transactions.

Furthermore, the Commission notes that its decision not to require express verifiable authorization for payments made by debit card is based in part on the practical reality that it is currently impossible for merchants to distinguish credit cards from debit cards, particularly in distance transactions. The Commission believes that the appropriate balance of protecting consumers without unduly burdening industry is best met by excluding debit cards from the requirements of the express verifiable authorization provision, for to do otherwise would result in requiring express verifiable authorization for all credit card payments, an unnecessary and costly burden.[321] The core dispute resolution protection provided by Regulation E, in conjunction with its critical protection against unauthorized charges, will provide a vital safety net for consumers who choose to pay by debit card.

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within ten days of the financial institution's receipt of the consumer's complaint, or a provisional credit must be issued. Collier Shannon also noted that the coverage of the regulations diverges in some instances because some of the dispute resolution protections available under Regulation Z only make sense in the context of a credit transaction, such as the provision that a creditor may not seek to collect funds or issue a negative statement on a consumer's credit report). *See* Collier Shannon-NPRM at Appendix F. The Commission notes, in regard to the argument made by Collier Shannon regarding the shorter time period allowed for investigations under Regulation E, that a shorter time frame is entirely appropriate because the funds at issue are the consumer's, not the funds of a credit card lender.

[321] *See* June 2002 Tr. III at 11 (DMA) (noting that requiring express verifiable authorization in all instances would be "highly expensive.").

Thus, the Commission has determined that express verifiable authorization will be required only in instances when the payment method is not a credit card subject to the protections of Regulation Z or a debit card subject to the protections of Regulation E.[322]

Express written authorization. Section 310.3(a)(3)(i) of the proposed Rule states that authorization will be deemed verifiable if it is by "express written authorization . . . which includes the customer's or donor's signature." The footnote to this section of the Rule notes that "the term 'signature' shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law."

The Commission received few comments on this provision overall. AARP reiterated its long-standing position that all express verifiable authorizations should be in writing.[323] The Commission maintains its position that to require written authorization in every instance would unduly burden sellers and telemarketers, potentially impede the growth of new payment mechanisms, and not provide meaningful benefits to consumers above and beyond those ensured by the other two means of obtaining authorization under the Rule. Therefore, the Commission declines to require written authorization of a transaction in every instance. Another commenter requested clarification that a signed check would meet the requirements of § 310.3(a)(3)(i) of the amended Rule.[324] The original

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[322] Cendant requested that the Commission explicitly note in the Rule that the marketer can rely upon the statement by the consumer identifying the type of billing mechanism that the customer is using to pay. Cendant-NPRM at 9. The Commission believes that its modified approach, exempting from the express verifiable authorization provision both credit *and* debit cards, obviates the need for such a statement to be included in the Rule.

[323] AARP-NPRM at 7.

[324] Tribune at 7.

Rule's express verifiable authorization only pertained to demand drafts; and, as the Commission noted in the TSR Compliance Guide, "[a]ny form of written authorization from a consumer is acceptable," including "a 'voided' signed check." [325] While the language of the amended Rule is arguably broad enough to cover payment methods such as check and money order, the customer's or donor's signed check or money order would, in every instance, be sufficient to serve as written authorization pursuant to 310.3(a)(3)(i).

A handful of commenters addressed the interplay between the E-SIGN Act [326] and the Rule. One industry commenter urged that the Commission explicitly state that the E-SIGN Act governs transactions under the TSR,[327] and another requested the amended Rule expressly adopt the definitions of "electronic record" and "electronic signature" used in the E-SIGN Act.[328] In particular, commenters expressed concern over the Commission's use of the term "verifiable" [329] as a modifier in discussing what would constitute a valid signature under the Rule. While the Commission declines at this time to expressly incorporate the E-SIGN Act's definitions into the Rule, it has determined that deleting the term "verifiable" from the amended Rule will alleviate the concerns expressed

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[325] TSR Compliance Guide at 19.

[326] Electronic Signatures in Global and National Commerce Act ("E-SIGN Act"), Pub. L. No. 106-229, 106th Cong. 2d Sess., 114 Stat. 464 (2000), codified at 15 U.S.C. § 7001 *et seq*.

[327] EFSC-NPRM at 9-10.

[328] Intuit-NPRM at 22.

[329] 67 FR 4542. In the NPRM, the Commission noted, in a footnote to § 310.3(a)(3)(i), that "[f]or purposes of this Rule, the term 'signature' shall include a *verifiable* electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law." (emphasis added).

by industry, without compromising the protections afforded to consumers.[330]

NCLC suggested that the Rule incorporate the procedures set forth in § 101(c) of the E-SIGN Act for using electronic records to provide a consumer with written disclosures required by the Rule.[331] Under § 101(c), the consumer must, among other things, affirmatively consent to such use of electronic records and acknowledge that he or she has the hardware and software necessary to access the requisite information electronically. The Commission is deferring any determination at this time as to the specific manner in which the Rule should incorporate these statutory procedures until it has clearer evidence or experience from which to develop an appropriate and effective regulatory interpretation, consistent with the E-SIGN Act, to ensure that written disclosures required under the Rule are provided clearly and conspicuously to consumers if and when a seller or telemarketer uses electronic means to provide such disclosures.[332]

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[330] The Commission believes that the remaining language regarding signatures makes plain that sellers and telemarketers who choose to obtain express verifiable authorization using the express written authorization method, and who wish to use digital or electronic signatures, will need to comply with applicable federal law and state contract law. The Commission believes, by way of example, that a seller or telemarketer who obtained a signature that would be valid under the E-SIGN Act's standards would meet its burden under this provision of the Rule.

[331] NCLC-NPRM at 3.

[332] *See generally* FTC and Dept. of Commerce, *Report to Congress on the Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, June 2001 (noting that nearly all participants in a workshop held to discuss the provision agreed that further study of the provision and its role in the marketplace was necessary). *See also* E-SIGN Act § 104 (preserving agency authority to interpret § 101).

Finally, NCLC suggested that the Commission require that the information set forth in § 310.3(a)(3)(ii)(A)-(G), be required when the written method of express verifiable authorization is used.[333] The Commission declines to adopt this suggestion because the record does not support the argument that such a requirement is necessary in instances when the consumer controls the method of payment, and provides written authorization, including a signature, to the seller or telemarketer prior to the submission for payment of the consumer's billing information.

Oral authorization. The proposed Rule modified and expanded the list of information that must be recited in order for oral authorization to be deemed verifiable. In particular, the proposed Rule added the requirement that the specific billing information of the customer or donor, including the name of the account and the account number that will be used to collect payment for the transaction, must be identified as part of the express verifiable authorization process. Finally, certain wording changes were proposed to address the expansion of the express verifiable authorization provision to cover not just demand drafts, but all methods of payment that lacked specific protections under TILA and FCBA. In addition, the information was reorganized.[334]

In § 310.3(a)(3)(ii) of the amended Rule, the Commission has retained the proposed oral authorization provision, with three minor wording changes. First, the broader term "other billing entity" replaces the term "credit card company,"

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[333] NCLC-NPRM at 10-11.

[334] *See* Proposed Rule § 310.3(a)(3)(ii)(A)-(D), (F)-(G). For example, the term "draft," used in the original provision, was replaced with the phrase "debit(s), charge(s), or payment(s)" in the proposed version, to reflect that methods of payment other than demand draft would now be covered by the Rule. For the same reason, and because of the mandate of the USA PATRIOT Act, the term "payor's" was replaced by the phrase "customer's or donor's."

which was included in the proposed Rule as an example of an entity to whom a seller or telemarketer would need to make available a recording of a customer's or donor's express oral authorization. Second, the phrase "authorization of payment for goods or services or charitable contribution" is inserted to reflect the expansion of this provision to reach charitable solicitations. Third, the term "sales offer" has been replaced with "telemarketing transaction." These last two changes are intended to conform this provision to the mandate of the USA PATRIOT Act.

Few comments were prompted by this section generally, or by any of the specific proposed disclosures required to satisfy the oral authorization provision. One commenter noted that the audio recording method of obtaining express verifiable authorization may require the consent of the customer or donor in states that require two-party consent to record telephone calls.[335] The Commission notes that determining compliance with state law taping requirements has been and will continue to be the responsibility of those sellers and telemarketers who choose to use this method of authorization. Another commenter asked the Commission to state explicitly that "a telemarketer cannot circumvent a writing requirement [such as required by EFTA for recurring drafts] by holding up the express oral authorization in the [TSR]."[336] Clearly, compliance with the EFTA and compliance with the TSR are separate obligations, and to the extent that an entity is subject to both regulations, it must determine how best to comply with both. Therefore, the Commission declines to modify the Rule to include such guidance.

Another commenter, ARDA, requested that § 310.3(a)(3)(ii)(A), which requires disclosure of the number of debits, charges or payments, be modified. ARDA requested that the

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[335] Worsham-NPRM at 6.

[336] NCLC-NPRM at 11.

parenthetical phrase "if more than one" be reinstated in the Rule to ensure that this disclosure is only made in instances where there will be multiple debits, charges, or payments; to do otherwise, ARDA argued, would be a burden on industry to state what would likely be presumed by consumers—that is, that only a single payment will be required.[337] The Commission agrees that the benefit to consumers of disclosing that there will only be a single payment does not outweigh the burden on sellers and telemarketers to have to make such a disclosure. Therefore, the Commission has reinstated the phrase "(if more than one)" at the end of § 310.3(a)(3)(ii)(A). No comments in the record suggest modification of proposed § 310.3(a)(3)(ii)(C) (requiring disclosure of the amount of the debit(s), charge(s), or payment(s)); (D) (disclosure of the customer's or donor's name); (F) (the disclosure of a telephone number for customer or donor inquiry); or (G) (the date of the customer's or donor's oral authorization). Therefore, these sections are retained in the amended Rule without alteration.

Proposed § 310.3(a)(3)(ii)(B) required that "the date of the debit(s), charge(s), or payment(s)" be recited for oral authorization to be deemed verifiable. This proposal drew criticism from members of industry, including MasterCard and KeyCorp, who noted that, in many instances, telemarketers would not possess this information, and suggested that the frequency of the payment could be recited instead.[338] The Commission agrees that in at least some instances the exact date of payment—that is, the date on which the charge will appear on a customer's or donor's billing statement or be debited from a customer's or donor's account—may be unknown at the time of the transaction. Therefore, the amended Rule provision requires instead that the seller or

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[337] ARDA-NPRM at 5-6.

[338] MasterCard-NPRM at 6-7; KeyCorp-NPRM at 5.

telemarketer recite the date on which the debit(s), charge(s), or payment(s) will be submitted for payment. The Commission believes that this piece of information is, or without much burden can be, known to a seller or telemarketer, and that providing this date to the customer or donor will supply a means for determining approximately when such debit(s), charge(s), or payment(s) will be posted to the customer's or donor's account.

Several commenters also expressed concern about the requirement, in § 310.3(a)(3)(ii)(E), that, as part of oral authorization, a customer or donor receive his or her specific billing information, including the name of the account and the account number to be charged.[339] These commenters stated that there are dangers inherent in having a telemarketing sales representative recite or receive from the consumer the consumer's full account number over the telephone.[340]

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[339] *See, e.g.*, AFSA-NPRM at 17-18; CCC-NPRM at 12 (recommending § 310.3(a)(3)(ii)(E) be deleted entirely); DialAmerica-NPRM at 27 (noting its support for the disclosure of the account name); Fleet-NPRM at 6; KeyCorp-NPRM at 5; MasterCard-NPRM at 5 (noting that if the provision is not deleted, the amended Rule should at least exempt from compliance entities subject to the privacy provisions of the GLBA); Wells Fargo-NPRM at 3.

[340] *See, e.g.*, KeyCorp-NPRM at 5; MasterCard-NPRM at 5. These commenters expressed concern about identity theft and unauthorized charges occurring as a result of the express disclosure of this information. Several commenters noted that consumers are disinclined to provide their account numbers in telemarketing, in part due to the success of consumer protection education campaigns that have stressed that a consumer should only provide his or her account number in telemarketing if the consumer knows the seller with whom he or she is dealing. *See, e.g.*, Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; VISA-NPRM at 6-7. Some commenters noted that marketers will not have such account numbers in some instances, such as in preacquired account telemarketing involving a joint marketing program, and thus will be unable to ensure the customer's "receipt" of this information. *See, e.g.*, Household Auto-NPRM at 4; NEMA-NPRM at 8-10 (noting that the " receipt" language directly contradicts the NEMA's guidelines to ensure

On the other hand, comments from consumer groups were generally supportive of the expanded disclosures required as a predicate for oral authorization to be deemed verifiable. NCL noted that billing disputes are prevalent in connection with deceptive or abusive telemarketing, and complaints about such disputes often arise when a consumer has been duped into providing his or her billing information for some bogus purpose, such as "verification," or to enable the seller purportedly to deposit sweepstakes winnings to the consumer's account.[341] NCL also noted that consumers may provide their account information in conjunction with a payment for a particular item, but then be billed for additional goods or services that they did not authorize.[342] Based on its

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that the customer "disclose" such information before processing a charge, and will result in duplicative information being exchanged); Green Mountain-NPRM at 26 (requesting an exemption because the energy industry is highly regulated). As discussed below, the Commission decided to delete the requirement that the account number be disclosed, and therefore the Commission anticipates that this will ameliorate the concern about preacquired account telemarketing. In every instance, the seller or telemarketer should be able to tell the customer or donor the name of the billing vehicle and enough other information to ensure that the customer or donor knows what account will be used to collect payment. As to NEMA's and, to some extent, Green Mountain's concern about redundancy, it is true that in a non-preacquired account call, some information, such as the customer's or donor's billing information, will initially be unknown to the telemarketer. It is equally true that some of the information a customer must receive under § 310.3(a)(3)(ii) is known only to the telemarketer, such as the date a charge will be submitted for payment and a customer or donor service number. The Commission believes that, for payment methods that are novel and lacking in certain consumer protections, it is critical for the customer to authorize the payment. If a seller or telemarketer chooses the express oral authorization method, then it is incumbent upon them to ensure that a consumer receives this information, even if redundant, as part of the recorded authorization.

[341] NCL-NPRM at 4.

[342] *Id.*

experience, NCL "believes that it is important to verify both the account that will be billed and the fact that the consumer is agreeing to purchase specific products or services using that account."[343] NAAG concurred, stating that the proposed Rule's express requirements to recite the account name and number would be beneficial to consumers who, as law enforcement experience demonstrates, may otherwise be unaware of this critical information.[344]

Based on the record, the Commission has decided to modify the proposed provision to limit the required amount of information about an account that must be received by a customer or donor to comply with the express verifiable authorization provision. The amended Rule requires that the customer or donor receive "billing information, identified with sufficient specificity that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution."[345] This more flexible standard takes into account concern about identity theft, but still mandates that the customer receive information sufficient to understand what account is being used to process payment for the transaction. It will allow telemarketers the option to state, for example, the name and the last four digits of the account to be charged, rather than the full account number.

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[343] *Id.*

[344] NAAG-NPRM at 48-49.

[345] Amended Rule § 310.3(a)(3)(ii)(E). The requirement that the account be identified with sufficient specificity that the customer or donor under-stands what account will be used to collect payment mirrors the provision in amended Rule § 310.4(a)(6)(ii)(A), requiring that, in telemarketing transactions involving preacquired account information, a seller or tele-marketer obtain express informed consent by identifying the account to be charged with specificity such that the customer or donor understands what account will be charged.

Written confirmation. The Commission received several comments regarding its proposal to delete § 310.3(a)(3)(iii) from the Rule. This section of the original Rule allows a seller or telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the customer prior to submitting the customer's billing information to be charged. In general, industry commenters opposed the Commission's proposal to delete this provision from the Rule, arguing that, contrary to the evidence presented during the Rule Review, this method of authorization is commonly used in telemarketing.[346] Aegis noted that there is nothing "inherently fraudulent, abusive, or problematic" with this method of obtaining express verifiable authorization, and urged the Commission to retain it.[347] Industry commenters urged the Commission to retain this provision, especially because it provides a low-cost alternative to recording a customer's oral authorization.[348]

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[346] *See, e.g.*, ARDA-NPRM at 5 (noting that the written confirmation method may actually increase in popularity if the additional requirements during oral authorization are adopted in a final Rule); ARDA-Supp. at 1 (noting that the Rule should allow for flexibility given the rapid technological changes in payment methods); CCC-NPRM at 14 (asserting that "this method is readily available, straightforward, reliable and is currently used by many marketers."); CNHI-NPRM at 1 (noting that eliminating this method would place newspapers at "an unfair competitive disadvantage"); EFSC-NPRM at 8; NAA-NPRM at 16 ("many newspapers regularly and legitimately used this method" and would incur considerable expense using the written or oral authorization methods instead).

[347] Aegis-NPRM at 4. *Accord* Noble-NPRM at 4 (arguing there is nothing inherently fraudulent about this method of authorization); PMA-NPRM at 20 (suggesting that the record does not support elimination of this method of authorization); Technion-NPRM at 5 (arguing there is nothing "wrong with" this method of authorization).

[348] *See, e.g.*, Capital One-NPRM at 8; Gannett-NPRM at 1; Intuit-NPRM at 19-20; MPA-NPRM at 27; PMA-NPRM at 20 (urging that this method be retained in part to reduce costs for inbound call centers who,

Consumer groups and law enforcement officials expressed their support for deleting this provision from the Rule, or modifying it to ensure that consumers are better protected when this method is used.[349] NAAG, for example, noted the potential danger inherent in the written confirmation provision as it is worded in the original Rule. Specifically, NAAG opined that consumers are likely to overlook a confirmation that appears to be yet another piece of "junk mail,"[350] and recommended that the Rule be amended to specifically require that any confirmation document sent pursuant to this method of authorization be clearly and conspicuously labeled as such.[351] NAAG also suggested that, if reinstated, the written confirmation method should not be considered a "verifiable" means of obtaining consumers' authorization in circumstances when the consumer is already vulnerable, such as when the goods or services to be paid for are offered in conjunction with a "free-to-pay conversion" or "negative option feature," or when the seller or telemarketer has pre-acquired account information prior to the initiation of the call.[352] MPA suggested that perhaps this method could be reinstated if used in the sale of goods or services for which a liberal refund policy exists.[353] NAAG raised the concern that

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under proposed revisions to address upselling, would need to conduct express verifiable authorization and may not be equipped to do so by taping); June 2002 Tr. III at 40-42 (CCC, noting that written confirmation "is the cheapest way of effectuating a transaction;" ERA, stating that reinstating the written confirmation method will "help balance the additional costs" incurred due to the expansion of the express verifiable authorization requirement).

[349] *See, e.g.*, NAAG-NPRM at 49.

[350] *Id.* (noting that such confirmations "tend to go unnoticed or unrecognized by consumers, thereby failing in their function of 'authorizing' a payment").

[351] *Id.*

[352] *See* June 2002 Tr. III at 42-43 (NAAG).

[353] *Id.* at 44 (MPA).

there might exist a material inconsistency between the disclosures made in the sales portion of the call and those sent as part of a post-call confirmation.[354]

In response to this range of comment, the Commission has decided to reinstate the written confirmation method of obtaining express verifiable authorization, with certain modifications. After balancing the concerns enunciated by consumer groups against industry's strongly-stated desire to reinstate this economical means of obtaining express verifiable authorization, the Commission has determined to modify the provision to enhance the likelihood that consumers will receive these written confirmations in a timely manner and will recognize the confirmations as important documents that should not be thrown away unopened. The amended Rule continues to require that the written confirmation disclose all of the information contained in § 310.3(a)(3)(ii)(A)-(G), as well as a statement of the procedures by which the customer can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate. However, the amended Rule requires that the written confirmation be "clearly and conspicuously labeled" as such, on the outside of the envelope in which it is sent, and that it be sent to the customer by first class mail[355] prior to the submission for payment of

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[354] *Id.* at 48-49 (NAAG).

[355] The requirement that such confirmations be sent via first class mail should cause industry to incur no additional expense. According to the DMA representative at the June 2002 Forum, federal postal regulations require that such confirmations be sent via first class mail. *See* June 2002 Tr. III at 45; *see also* June 2002 Tr. III at 47 (CCC) (noting that company practice is to ensure that written confirmations are clearly and conspicuously labeled). This change to the Rule, then, will merely echo the postal regulations, which require that personalized business correspondence be sent via first class mail. *See* 39 CFR 3001.68, App. A.

the customer's or donor's billing information.[356] The Commission will continue to monitor the use of the post-sale written confirmation method of express verifiable authorization and may revisit this issue in a subsequent Rule Review should circumstances warrant.

The amended Rule also proscribes the use of the post-sale method of authorization when the goods or services that are the subject of the transaction are offered in conjunction with a "free-to-pay conversion" feature and preacquired account information. The record is replete with evidence, detailed in the section below discussing new § 310.4(a)(6), that "free-to-pay conversion" offers, particularly when coupled with the use of preacquired account information, have often resulted in unauthorized charges to consumers.[357] Given this evidence, coupled with NAAG's observation that "[a] consumer who does not believe they entered into a transaction would be less likely to even open mail from a company whose offer he or she had recently 'declined,'"[358] the Commission will require that authorization in such situations must be obtained pursuant to either § 310.3(a)(3)(i) or (ii).

§ 310.3(a)(4)—Prohibition of false and misleading statements to induce the purchase of goods or services or a charitable contribution

The only proposed modification of this provision in the NPRM was to expand it, pursuant to the mandate of the USA

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[356] The Commission has declined, at this time, to follow the suggestion by Capital One that the written confirmation method should be reinstated, "provided that the confirmation is delivered 30 days prior to submission for payment, and the customer is permitted to repudiate the sale within that time by calling a toll-free number," because the record provides too little evidence to suggest that these additional protections are necessary to prevent consumer injury. See Capital One-NPRM at 8.

[357] *See* discussion of amended Rule § 310.4(a)(6), below. *See* also June 2002 Tr. III at 42-43 (NAAG).

[358] NAAG-NPRM at 49.

PATRIOT Act, to encompass misrepresentations made to induce a charitable contribution.[359] The Commission received few comments on this section, and none opposing this proposed expansion.[360] Therefore, the Commission adopts the wording of proposed § 310.3(a)(4) unchanged in the amended Rule.

§ 310.3(b) —Assisting and facilitating

Section 310.3(b) of the original Rule prohibits a person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is violating certain provisions of the Rule. During the Rule Review, the Commission received comments from consumer protection and law enforcement groups who argued that the "conscious avoidance" standard adopted in the original Rule should be modified to a "knew or should have known standard."[361] The Commission noted that it continued to support the "conscious avoidance" standard, believing that such a standard is appropriate "in a situation where a person's liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person."[362] Although the provision was retained in the proposed Rule without amendment, its coverage was expanded to cover assisting and facilitating in the solicitation of charitable contributions pursuant to the USA PATRIOT Act. The Commission invited additional

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[359] Proposed Rule § 310.3(a)(4). *See* 67 FR 4508.

[360] *See, e.g.*, Make-A-Wish-NPRM, *passim* (detailing complaints received by Make-A-Wish, which does not solicit donations by telephone, regarding fraudulent telemarketers claiming or implying that they are calling from or affiliated with Make-A-Wish).

[361] *See* 67 FR at 4508-09.

[362] *Id.* at 4509.

comment on, and proposed alternatives to, the assisting and facilitating standard.[363]

In response to the NPRM, VISA noted that although this provision was retained unchanged in the proposed Rule, "the expanded scope of the Proposed Rule, including provisions that conflict with the GLBA privacy rules, could require financial institutions to police the activities of third parties, many of whom are themselves regulated entities."[364] The Commission believes that the modifications to the pre-acquired account telemarketing provisions in the amended Rule obviate the concerns expressed by VISA.[365]

ARDA expressed its support for retaining the "conscious avoidance" standard, endorsing the rationale enunciated by the Commission in the NPRM for the heightened knowledge requirement.[366] But AARP reiterated its concern that the conscious avoidance standard places too high a burden on law enforcement, and urged the Commission to substitute a "knew or should have known" standard for the assisting and facilitating provision.[367] NACAA also urged the Commission to adopt a "knew or should have known" standard in the amended Rule.[368] NAAG made a similar recommendation, noting that the current standard results in "both federal and state authorities [being] unduly hampered in trying to reduce telemarketing fraud."[369] NAAG also noted that this provision is critical in addressing the participation of those United States-based entities, such as sellers of victim lists, fulfillment

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[363] *Id.*

[364] VISA-NPRM at 12.

[365] *See* discussion of amended Rule §§ 310.4(a)(5) and (6) below.

[366] ARDA-NPRM at 6.

[367] AARP-NPRM at 8.

[368] NACAA-NPRM at 8.

[369] NAAG-NPRM at 56.

house operators, and credit card launderers, who provide necessary assistance to fraudulent telemarketers, many of whom have begun operating from outside the country.[370]

The Commission declines, on the record evidence, to lower the standard for assisting and facilitating under the Rule. The Commission continues to believe the "conscious avoidance" standard is the appropriate one in instances when liability to pay redress or civil penalties rests on another person's violation of the Rule. Further, the Commission believes the "conscious avoidance" standard is one that can be met in situations where third parties provide substantial assistance to fraudulent telemarketers. As stated in the original SBP, this standard "is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance."[371] In the hypothetical situations posed in NAAG's comment, the Commission believes it would be possible to demonstrate such "deliberate ignorance" on the part of, for example, a fulfillment house that ships only inexpensive prizes on behalf of a telemarketer about whom it receives numerous complaints. The Commission itself has brought several cases successfully using the assisting and facilitating provision, and has found the provision to be a useful tool in combating fraudulent telemarketing.[372]

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[370] *Id.* (suggesting that liability for those who assist and facilitate is particularly important when the fraudulent telemarketer holds no assets in the United States).

[371] 60 FR at 43852.

[372] *See* 67 FR at 4509, n.155. *See also FTC v. Allstate Bus. Distrib'n. Ctr., Inc.*, No. 00-10335AHM (CTX) (C.D. Cal. 2001); *FTC v. Sweet Song Corp.*, No. CV-97-4544 LGB (Jgx) (C.D. Cal. 1997); *FTC v. Walton* (d/b/a Pinnacle Fin. Servs.), No. CIV98-0018 PCT SMM (D. Ariz. Jan. 1998).

§ 310.3(c)—Credit card laundering

In the NPRM, the Commission retained the original Rule provision addressing credit card laundering, but noted that the coverage of the provision in the proposed Rule would expand to cover credit card laundering in the solicitation of charitable contributions, pursuant to the mandate of the USA PATRIOT Act.[373] Although the proposed Rule was issued with this provision unmodified, the Commission expressed concern that the provision's "usefulness may be unduly restricted by the phrases '[e]xcept as expressly permitted by the applicable credit card system,' in the preamble to § 310.3(c), and 'when such access is not authorized by the merchant agreement or the applicable credit card system,' in § 310.3(c)(3)."[374]

Having received no comment regarding the credit card laundering provision generally, or regarding the Commission's specific concerns, the Commission has determined to retain this provision in its original form. The Commission will continue to monitor its effectiveness, however, and may reconsider modifications at the next Rule Review.

§ 310.3(d) —Prohibited deceptive acts or practices in the solicitation of charitable contributions

Pursuant to § 1011(b)(1) of the USA PATRIOT Act, the Commission proposed in the NPRM to include in the Rule new prohibited misrepresentations in the solicitation of charitable contributions.[375] The amended Rule retains § 310.3(d) unchanged, with the following exceptions. First, the phrase "after any administrative or fundraising expenses are deducted" has been deleted from § 310.3(d)(4). The Commission believes that the provision is clearer absent this qualify-

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[373] *See* 67 FR at 4509

[374] *Id.*

[375] *Id.* at 4509-10 (discussing the reasoning behind the prohibited misrepresentations included in proposed Rule § 310.3(d)).

ing phrase, and thus has stricken it in the amended Rule. Second, § 310.3(d)(6), the prohibited misrepresentation regarding advertising sales has been deleted. As discussed below, in the section addressing § 310.6(b)(7), the Commission has determined to exempt from the Rule's coverage business-to-business calls to induce a charitable solicitation. As a result, the prohibition against misrepresentations regarding the sale of advertising, which would occur in a business-to-business context, is no longer necessary. Finally, proposed § 310.3(d)(7), prohibiting misrepresentations regarding a charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity, is renumbered in the amended Rule as § 310.3(d)(6).

Section 310.3(d) prohibits misrepresentations regarding certain material information that a telemarketer might choose to convey to a donor to induce a charitable contribution.[376] The goal of the prohibition on these misrepresentations is to ensure that donors solicited for charitable contributions are not deceived, a purpose squarely in line with the mandate of the USA PATRIOT Act, which directed the Commission to include "fraudulent charitable solicitations" in the deceptive practices prohibited by the TSR.[377] Deception occurs if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.[378] As set forth in the NPRM, the Commission believes that if any of the items listed in this section are misrepresented, donors are likely to be misled, as false

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[376] Amended Rule § 310.3(d)(1)-(7).

[377] USA PATRIOT Act § 1011(b)(1).

[378] *See Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. 1984).

representations of material facts are likely to mislead.[379] Moreover, the Commission's enforce-ment experience shows that often such representations are express, and therefore presumptively material. If implied, such representations are still likely to influence a donor's decision whether to contribute. Therefore, "misrepresentation of any of these [] categories of material information is deceptive, in violation of section 5 of the FTC Act."[380]

In response to the NPRM, some commenters expressed their general support for the USA PATRIOT Act amend-ments, which extended the Rule's coverage to for-profit telemarketers soliciting charitable donations. AARP, for ex-ample, noted its support for the general purposes of the USA PATRIOT Act, stating that the amendments would prevent fraudulent charitable solicitations while still allowing "legiti-mate fundraising appeals."[381] Similarly, NCL noted that the new provisions in the TSR regarding for-profit fundraisers will be "very helpful in curbing deceptive and abusive practices."[382]

Very few comments were received specifically on § 310.3(d) of the proposed Rule. One such comment, from NCL, noted that "[t]he proposed list of prohibited practices covers most of the common abuses that are reported by consumers and businesses."[383] NCL did suggest adding an additional prohibited misrepresentation on "sound-alikes," or the use of a name similar or identical to that of a legitimate charity in an attempt to benefit from that charity's good

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[379] *See Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[380] 67 FR at 4510.

[381] AARP-NPRM at 4.

[382] NCL-NPRM at 2.

[383] *Id.* at 5.

will.[384] Similarly, Make-A-Wish proposed prohibiting misrepresentations of the "identity" of the entity on whose behalf the charitable solicitation is being sought.[385] NAAG and NASCO suggested that the Commission clarify that proposed § 310.3(d)(7), which prohibits misrepresentations regarding "[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity," would prohibit misrepresentations of a seller's or telemarketer's affiliation with any charity.[386] The Commission believes that proposed § 310.3(d)(7), renumbered as § 310.3(d)(6) in the amended Rule, is broad enough to prohibit the "sound-alike" misrepresentation NCL raised, as well as to prohibit a misrepresentation regarding one's affiliation with any charity. Therefore, the Commission declines to add a further misrepresentation to specifically address the "sound-alike" scenario, or add the "identity" of the charity to the prohibited misrepresentations.

NAAG and NASCO also proposed one further modification: the addition of a prohibited misrepresentation of "[t]he address or location of the charitable organization, and where the organization conducts its activities."[387] NAAG stated that the addition of such a provision would ensure that telemarketers do not misrepresent that the charities on whose behalf they are soliciting are "local" or that their activities are local, since the local character of a charity or its programs often is material to prospective donors. According to NAAG, because many prospective donors prefer to support organizations that will benefit their own community, fundraisers sometimes take advantage of that sentiment by using a local post office box or other local address as their return address,

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[384] *Id.*

[385] Make-A-Wish-NPRM at 5.

[386] NAAG-NPRM at 53. *See also* NASCO-NPRM at 7.

[387] NAAG-NPRM at 53.

to make it seem as if the charity is based close to the donors.[388]

The Commission believes that any misrepresentation of the charitable organization's location, or the location where the funds are to be used, would likely violate § 310.3(d)(3), which prohibits misrepresentation of the "purpose for which any charitable contribution will be used." Therefore, the Commission declines to include a specific prohibited misrepresentation regarding the address or location of a charity.

D. *Section 310.4 – Abusive Telemarketing Acts or Practices.*

The Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices *and other abusive telemarketing acts or practices*."[389] The Act does not define the term "abusive telemarketing act or practice." It directs the Commission to include in the TSR provisions prohibiting three specific "abusive" telemarketing practices, namely, for any telemarketer to: 1) "undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" 2) make unsolicited phone calls to consumers during certain hours of the day or night; and 3) fail to "promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services."[390] The Act does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.[391] Accordingly, the

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[388] *Id.*

[389] 15 U.S.C. 6102(a)(1) (emphasis added).

[390] 15 U.S.C. 6102(a)(3).

[391] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3d ed. 1994) (noting that

Commission adopted a Rule that addresses the three specific practices mentioned in the statute, and, additionally, five other practices that the Commission determined to be abusive under the Act.

Each of the three abusive practices enumerated in the Act implicates consumers' privacy. In fact, with respect to the first of these practices, the explicit language of the statute directs the FTC to regulate "calls which the reasonable consumer would consider coercive or abusive of such consumer's *right to privacy*."[392] Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item,[393] Congress recognized that telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry. The calling times limitation protects consumers from telemarketing intrusions during the late night and early morning, when the toll on their privacy from such calls would likely be greatest. The third enumerated practice[394] also relates to privacy, in that it requires the consumer be given information promptly that will enable him to decide whether to allow the infringement on his time and privacy to go beyond the initial invasion. Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy

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agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

[392] 15 U.S.C. 6102(a)(3)(A) (emphasis added).

[393] 15 U.S.C. 6102(a)(3)(B).

[394] 15 U.S.C. 6102(a)(3)(C).

but are not likely deceptive under FTC jurisprudence. This recognition by Congress, that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse, and its directive to the Commission to rein in these tactics lie at the heart of § 310.4 of the TSR.

The practices not specified as abusive in the Act, but determined by the Commission to be abusive and thus prohibited in the original rulemaking are: (1) threatening or intimidating a consumer, or using profane or obscene language; (2) "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person;" (3) requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered; (4) requesting or receiving payment for recovery services prior to delivery and proof that such services have been rendered; and (5) "requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit."

The first two of these are directly consistent with the Act's emphasis on privacy protection, and with the intent, made explicit in the legislative history, that the TSR address these particular practices.[395] In the SBP for the original Rule, the

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[395] "With respect to the bill's reference to 'other abusive telemarketing activities' . . . the Committee intends that the Commission's rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer's right to privacy." H.R. REP. NO. 103-20 at 8 (1993).

Commission stated, with respect to the prohibition on threats, intimidation, profane and obscene language, that these tactics "are clearly abusive in telemarketing transactions."[396] The Commission also noted that the commenters supported this view, and specifically cited the fact that "threats are a means of perpetrating a fraud on vulnerable victims, and [that] many older people can be particularly vulnerable . . . ."[397]

The remaining three abusive practices identified in the Rule—relating to credit repair services, recovery services, and advance fee loan services—were included in the Rule under the Telemarketing Act's grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices beyond the specified practices that implicate privacy concerns,[398] and gives the Commission discretion in exercising this authority.[399]

As noted above, some of the practices prohibited as abusive under the Act flow directly from the Telemarketing Act's emphasis on protecting consumers' privacy. When the Commission seeks to identify practices as abusive that are less distinctly within that parameter, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Com-

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[396] 60 FR at 30415.

[397] *Id.*

[398] 15 U.S.C. 6102(a)(1). The ordinary meaning of "abusive" is (1) "wrongly used; perverted; misapplied; catachrestic;" (2) "given to or tending to abuse,"(which is in turn defined as "improper treatment or use; application to a wrong or bad purpose"). Webster's International Dictionary, Unabridged 1949.

[399] 15 U.S.C. 6102(a)(1).

mission jurisprudence[400] and codified in the FTC Act.[401] This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original Rule. Whether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act's purview is not addressed or affected by this analysis.

The abusive practices relating to credit repair services, recovery services, and advance fee loan services each meet the criteria for unfairness. An act or practice is unfair under Section 5 of the FTC Act if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.[402] An important characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus. It is the essence of these schemes to take consumers' money for services that the seller has no intention of providing and in fact does not provide. Each of these schemes had been the subject of large numbers of consumer complaints and enforcement actions,[403] and in each

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[400] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984); Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in FTC Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 5, 1982); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh'g denied*, 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

[401] 15 U.S.C. 45(n).

[402] *Id.*

[403] During 1995 and 1996, the Commission brought or settled lawsuits against numerous individuals and companies involved in nearly a dozen

recovery room operations. *See, e.g., FTC v. Meridian Capital Mgmt.*, No. CV-S-96-63-PMP (RLH) (D. Nev. filed Nov. 20, 1996). The Commission's efforts against recovery rooms have borne fruit. The volume of consumer complaints concerning recovery rooms logged into the FTC Telemarketing Complaint System in 1996 plummeted to 153—less than one-fifth the record high volume of 869 complaints recorded in 1995. *See* "1995-1996 Staff Summary of FTC Activities Affecting Older Americans" (Mar. 1998). Complaints about "recovery" schemes have continued to decline dramatically, from a number three ranking in 1995 to a number twenty-five ranking in 1999, while complaints about credit repair have remained at a relatively low level since 1995 (steadily ranking about number twenty-three or twenty-four in terms of number of complaints received by the NFIC). NCL-RR at 11. The Commission continues to take action against fraudulent credit repair schemes; for example, in August 2000, the FTC, the Department of Justice and forty-seven other federal, state and local law enforcement and consumer protection agencies surfed the Web looking for illegal scams that promise consumers that they can restore their creditworthiness for a fee. Over 180 websites were put on notice that their credit repair claims may violate state and federal laws. *See* "Surf's Up for Crack Down on "Credit Repair" Scams," FTC press release dated Aug. 21, 2000). Unfortunately, complaints about advance fee loan schemes rose from a number fifteen ranking in 1995 to the number two ranking in 1998, with about 80 percent of the advance fee loan companies reported to the NFIC located in Canada. NCL-RR at 12. RR Tr. at 378. The Commission and the state Attorneys General continue to launch law enforcement "sweeps" targeting corporations and individuals that promise loans or credit cards for an advance fee, but never deliver them. A sweep was announced June 20, 2000, involving five cases filed by the FTC, 13 actions taken by state officials, and three cases filed by Canadian law enforcement authorities. *See* "FTC, States and Canadian Provinces Launch Crackdown on Outfits Falsely Promising Credit Cards and Loans for an Advance Fee," FTC press release dated June 20, 2000. Among the most recent FTC cases targeting advance fee loans, four involved advance fee credit card schemes: *FTC v. Fin. Servs. of N. Am.*, No. 00-792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. Home Life Credit*, No. CV00-06154 CM (Ex) (C.D. Cal. filed June 8, 2000); *FTC v. First Credit Alliance*, No. 300 CV 1049 (D. Conn. filed June 8, 2000); and *FTC v. Credit Approval Serv.*, No. G-00-324 (S.D. Tex. filed June 7, 2000). In addition, another case against a fraudulent credit card loss protection seller also included elements of illegal advance fee credit

case caused substantial injury to consumers. Amounting to nothing more than out-right theft, these practices conferred no potentially counter-vailing benefits. Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offer. Thus, these practices meet the statutory criteria for unfairness, and accordingly, the remedy imposed by the Rule to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.

§ 310.4(a)—Abusive conduct generally

Section 310.4(a) of the original Rule sets forth specific conduct that is considered to be an "abusive telemarketing act or practice" under the Rule. None of the comments in the Rule Review recommended that changes be made to the original wording of §§ 310.4(a)(1)-(3); nor had the Commission's enforcement experience revealed any difficulty with these provisions that would warrant amendment.[404] Although one commenter suggested amendments to § 310.4(a)(4), the Commission determined that no amendment was needed to the language of that provision.[405] Therefore, the language in these provisions was unchanged in the proposed Rule.

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card fees. *FTC v. First Capital Consumer Membership Servs., Inc.*, Civil No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000).

[404] Section 310.4(a)(1) prohibits as an abusive practice "threats, intimidation, or the use of profane [or obscene language." Section 310.4(a)(2) prohibits requesting advance payment for so-called "credit repair" services. Section 310.4(a)(3) prohibits requesting advance payment for the recovery of money lost by a consumer in a previous telemarketing transaction.

[405] Section 310.4(a)(4) prohibits requesting advance payment for obtaining a loan or other extension of credit when the seller or telemarketer has represented a high likelihood that the consumer will receive the loan or credit. NCL reported in its Rule Review comment that the number of complaints it received about such advance fee loan schemes

As noted in the NPRM, however, the Rule amendments mandated by the USA PATRIOT Act expand the reach of § 310.4(a) to encompass the solicitation of charitable contributions. The section begins with the statement "It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in [the conduct specified in subsections (1) through (6) of this provision of the Rule]."[406] The proposed Rule modified the definitions of "telemarketing," and, by association, "telemarketer," to encompass the solicitation of charitable contributions. Consequently § 310.4(a) of the proposed Rule would have applied to all telemarketers, including those engaged in the solicitation of charitable contributions. Each of the prohibitions in § 310.4(a) will therefore now apply to those telemarketers soliciting on behalf of either sellers or charitable organizations. As noted in the NPRM, the Commission believes it unlikely that § § 310.4(a)(2)-(4) will have any significant impact on telemarketers engaged in the solicitation of charitable contributions, since those sections all deal with practices that are commercial in nature and not associated with charitable solicitations. Sections 310.4(a)(1), (5), (6), (7) and (8) of the proposed Rule, however, addressed practices that are not necessarily confined to telemarketing to induce purchases of goods or services. They therefore may have had an impact upon telemarketers engaged in the solicitation of charitable contributions.

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had risen steeply in the five years since the Rule was promulgated. NCL also speculated that consumers may be confused about whether and under what circumstances fees are legitimately required for different types of loans, as evidenced by the numerous complaints about advance fee credit cards. NCL-RR at 11. The Commission noted in the NPRM its belief that the language of § 310.4(a)(4) already prohibits such advance fee credit card offers via telemarketing and that numerous federal and state law enforcement efforts have been directed at such offers. *See* discussion at 67 FR at 4510.

[406] Original and amended Rule § 310.4(a).

The Commission received many comments discussing the proposed modifications to § 310.4(a), and significant time was devoted to these issues at the June 2002 Forum. A summary of the major points on the record regarding the proposed amendments is provided below.

§ 310.4(a)(1)—Threats and intimidation

Section 310.4(a)(1), unchanged in the proposed Rule, specifies that it is an abusive telemarketing practice to engage in threats, intimidation, or the use of profane or obscene language. None of the comments in response to the NPRM recommended that changes be made to the wording of § 310.4(a)(1), although ICFA did request clarification of the term "intimidation," arguing that "a person could potentially claim to have been 'intimidated' simply because a pre-need caller suggested meeting to discuss funeral arrangements."[407] The Commission believes that under the language of the Rule, which focuses on the telemarketer's behavior, to "engage in . . . intimidation" could not reasonably be extended to cover the situation where a telemarketer merely invites a consumer to discuss funeral arrangements, even if the person called finds the prospect of funeral planning an "intimidating" one. Rather, as the Commission noted in the TSR Compliance Guide, this provision is meant to prohibit "intimidation, including acts which put undue pressure on a consumer, or which call into question a person's intelligence, honesty, reliability or concern for family."[408] The Commission believes further clarification is unnecessary, and thus declines to include in the amended Rule a definition of "intimidation." Therefore, the language in this provision remains unchanged in the amended Rule. However, the USA

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[407] ICFA-NPRM at 3.

[408] TSR Compliance Guide at 23 (noting that "[r]epeated calls to an individual who has declined to accept an offer may also be an act of intimidation").

PATRIOT Act expansion of the TSR brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(a)(2) —Credit repair

Section 310.4(a)(2) prohibits requesting or receiving a fee or consideration for goods or services represented to improve a person's creditworthiness until: 1) the time frame within which the seller has represented that the promised services will be provided has expired; and 2) the seller has provided the consumer with evidence that the services were successful—that is, that the consumer's creditworthiness has improved. No change to this section was incorporated in the proposed Rule, except to note its expanded coverage as a result of the USA PATRIOT Act.[409] The only comment received in response to the NPRM was from DBA, which requested that debt collectors be specifically exempted from compliance with this section.[410] As DBA itself noted, debt collection activities do not fall within the Rule's ambit in any event because they are outside the definition of "telemarketing."[411] Therefore, it is unnecessary to exempt debt collectors from compliance with this provision.

§ 310.4(a)(5) —Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing

The Commission has added a new provision, § 310.4(a)(5), which specifies that it is an abusive practice and a violation of the Rule to disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing.

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[409] 67 FR at 4512 (noting that "[i]t is unlikely that [this section] will have any significant impact on telemarketers engaged in the solicitation of charitable contributions. . .").

[410] DBA-NPRM at 2-4.

[411] *Id.*

As mentioned above, since the original Rule was promulgated, consumer concern over encroachments on their privacy has become widespread. One response to privacy concerns was passage of the GLBA[412] and its related regulations,[413] under which financial institutions, and the third parties with which they do business, may provide consumer account information to other third parties only in encrypted form for marketing purposes. To do otherwise is not only a violation of the GLBA and its related regulations,[414] but is construed by consumers as a breach of the financial institution's promise to consumers to keep the consumer's account information confidential and secure.[415]

Indeed, trading in unencrypted consumer account numbers has been uniformly condemned by virtually all parties who participated in this rulemaking proceeding. Although there was substantial debate regarding the Commission's proposal for a blanket prohibition on the transfer or receipt of consumers' billing information (*i.e.*, "preacquired account in-

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[412] Gramm-Leach-Bliley Act, *see* note 64 above.

[413] *See* 16 CFR 313.65 (2000) (FTC's Privacy Regulation). *See also* 17 CFR 160; 12 CFR 332; 12 CFR 715; 12 CFR 40; 12 CFR 573; and 17 CFR 248.

[414] *See, e.g.*, 12 CFR 313.12.

[415] *See* AARP-Supp. at 2 (describing the results of a survey AARP conducted in which the majority of consumers reported that they did not believe telemarketers could or should freely share their account information). *See also* Dave Finlayson (Msg. 491) ("I will cease doing business with any firm which gives out my personal private information."); BL (Msg. 1175) ("I also agree that [they should not get a credit card or other account number except from the consumer who chooses to deal with them. . . . This should include not SELLING (not just sharing as stated in our newspaper article) these numbers."); Anonymous (Msg. 3457) ("This is not what any reasonable person would consider "public information.' . . . Why would ANYONE consider this information that they can "share" without the customer's express permission?").

formation"),[416] there was no disagreement among commenters and forum participants about the notion that trafficking in lists of consumer account numbers was improper, in many cases illegal, and should be a violation of the Rule.[417] As ERA explained during the forum:

> [I]f there is a transfer of consumer information without knowledge of and prior to the consumers' consent, which would encompass, for example, your scenario where a list is compiled and a marketer [sold] its list with its credit card numbers to another marketer without telling the consumers on that list that they sold the list of account numbers, I think everyone at this table would agree . . . that this is a violation. . . . We've said in our comments that we would agree to a ban on that. Legitimate marketers don't do that. They don't sell consumer credit card numbers for money.[418]

Given that there is no legitimate reason to purchase unencrypted credit card numbers, the Commission believes there is a strong likelihood that telemarketers who engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers. This conclusion is consistent with the Commission's law enforcement

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[416] Over 50 of the major organizational commenters addressed the issue of preacquired account telemarketing, as did over 200 consumer commenters. In addition, a session of the June 2002 Forum was dedicated to the topic, and generated extensive discussion. *See* June 2002 Tr. II at 116-212.

[417] *See, e.g.*, ERA/PMA-Supp. at 14-15; PMA-NPRM at 14; June 2002 Tr. II at 183 (ERA). *See also* ATA-Supp. at 6; NCTA-NPRM at 12 ("[T]he trafficking of customer account information by unscrupulous telemarketers is a legitimate concern."). Also, the GLBA prohibits this practice on the part of financial institutions. 15 U.S.C. 6802(d); and *see, e.g.* 12 CFR 313.12.

[418] June 2002 Tr. II at 183.

experience.[419] Consumers cannot avoid the injury because they likely are unaware that their credit card numbers have been purchased and that a telemarketer possesses that information when they receive a telemarketing call. In addition, there is no evidence on the record of any countervailing benefits to consumers or competition by trafficking in lists of account numbers. As a result, the Commission concludes that the practice of selling unencrypted lists of credit card numbers is likely to cause substantial and unavoidable consumer injury in the form of unauthorized charges without any counter-vailing benefits. Thus, the Commission has determined to add Section 310.4(a)(5). This provision is consistent with the basic prohibition in the GLBA, and in essence, extends the ban on this practice beyond financial institutions and ensures that all sellers and telemarketers subject to the TSR are prohibited from this practice.

The prohibition in § 310.4(a)(5) is not limited to compilation and disclosure of lists of account numbers. Rather, any disclosure (or receipt) of unencrypted account information violates the Rule, unless the disclosure is for purposes of processing a payment for a transaction to which the consumer has consented after receiving all disclosures and other protections of the Rule. A seller or telemarketer could not, for example, provide or receive account numbers one at a

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[419] *See, e.g., FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000) (in which, outside the telemarketing context, defendant purchased unencrypted lists of consumer account numbers, which it used to charge consumers, purportedly for visits to adult websites, despite the fact that many of those charged did not even own computers). In addition, given the evidence that preacquired account telemarketing involving encrypted account information can result in unauthorized charges (as discussed in more detail below), the Commission believes that there is an even greater likelihood of consumer injury when telemarketers have purchased consumers' actual credit card numbers before contacting consumers about an offer.

time in order to circumvent this provision. Nor could a telemarketer obtain account information from consumers on behalf of one seller, and then retain it for sale or disclosure to another seller in another telemarketing campaign.[420]

By "unencrypted," the Commission means the actual account number, or lists of actual account numbers, or encrypted information with a key to unencrypt the data.[421] "Consideration" is not limited to cash payment for a list of account numbers. "Consideration" can take a variety of

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[420] *See, e.g., FTC v. Capital Club*, No. 94-6335 (D.N.J. 1994). According to the FTC complaint in that case, two companies, National Media and Media Arts, which marketed products through infomercials, allegedly sold or rented their customer lists to third-party service companies that sold products and services such as memberships in shopping and travel clubs. The lists contained customers' names, addresses, and telephone numbers, as well as their credit-card types, account numbers and expiration dates. The lists were provided to the service companies without the customers' knowledge or authorization. Some of the Capital Club defendants' roles included maintaining the lists, marketing them to the service companies, and conducting telemarketing calls on behalf of the service companies, according to the complaint. Industry representatives at the June 2002 Forum registered agreement that the Capital Club scenario would run afoul of a ban on trafficking in consumer account information. *See* June 2002 Tr. II at 193 (ERA) ("[T]hat's exactly the scenario that we're talking about that would be prohibited because when that third-party telemarketer retained that account information, it did so as an agent for the seller, so it was not that telemarketer's account information to begin with. They were capturing that for the seller on whose behalf that call was made, so if that telemarketer were then to call a consumer without knowledge and prior consent and use that credit card information again, that would be the kind of a transfer prior to and without consumer consent that we're talking about.")

[421] This, too, is consistent with the financial privacy regulations issued pursuant to the GLBA. See 12 CFR 313.12(c)(1) ("An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.") (emphasis added).

forms, including receiving a percentage of every "sale" using the unencrypted account information.

This provision allows processing a properly obtained payment for goods or services pursuant to a transaction. In addition, pursuant to the USA PATRIOT Act's expansion of the TSR to cover charitable solicitations, the provision also allows for the disclosure or receipt of a donor's account number to process a payment for a charitable contribution pursuant to a transaction. By "transaction," the Commission means a telemarketing transaction that complies with all applicable sections of the Rule, including new § 310.4(a)(6), discussed below, which prohibits any seller or telemarketer from causing a charge to be placed against a customer's or donor's account without that customer's or donor's express informed consent to the charge.[422]

§ 310.4(a)(6)—Causing a charge to be submitted for payment without the consumer's express informed consent

In the NPRM, the Commission proposed a prohibition on "receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing."[423] This proposed provision was prompted by extensive comments during the Rule Review concerning the severity and the scope of harm to consumers related to preacquired account telemarketing.[424] The proposal also arose from the Commission's law enforcement experience in this area, as well as that of the states, which demonstrates the consumer harm that can result

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[422] *See* amended Rule § 310.4(a)(6) and discussion of that provision, below.

[423] Proposed Rule § 310.4(a)(5), 67 FR at 4543.

[424] *See* 67 FR at 4512-14.

from this practice.[425] The comments received in response to the NPRM, however, demonstrate that much preacquired account telemarketing does not necessarily give rise to consumer injury—specifically, unauthorized charges—and in fact may benefit consumers. With this in mind, the Commission has focused more narrowly on the tangible harm, and has crafted precise solutions to the specific abuses evident in instances involving preacquired account information.

Section 310.4(a)(6) of the amended Rule is one of a number of provisions that collectively address the harm caused by certain forms of preacquired account telemarketing. The scope of this section, however, extends beyond the context of preacquired account telemarketing to any instance where the seller or telemarketer causes a charge to be submitted for payment without first obtaining the express informed consent of the customer or donor to be charged, and to be charged using a particular account or payment mechanism. This provision, along with several new definitions (amended Rule § 310.2(o) "free-to-pay conversion," § 310.2(t) "negative option feature," and § 310.2(w) "preacquired account information"), a new provision requiring specific disclosures of material information in any telemarketing transaction involving a negative option feature (amended Rule § 310.3(a)(1)(vii)), and a new provision prohibiting misrepresentations regarding any material aspect of a negative option feature (amended Rule § 310.3(a)(2)(ix)), together are designed to address in a more narrowly-tailored manner the problem originally targeted by the blanket prohibition against receiving account information from any person other than the consumer or disclosing that information for use in telemarketing.

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[425] *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *FTC v. Technobrands, Inc.*, No. 3:02 cv 00086 (E.D. Va. 2002); NAAG-NPRM at 30, n.73; Illinois-Supp. *passim.*

The blanket prohibition proposed in the NPRM, and the issue of preacquired account telemarketing generally, received substantial comment. Consumer groups and law enforcement agencies strongly supported the proposal, citing continued evidence of substantial consumer injury resulting from abusive preacquired account telemarketing practices.[426] Their comments strongly criticized a distinctive feature of preacquired account telemarketing—that is, that it fundamentally changes the customary bargaining relationship between seller and consumer by giving the seller the means to bill charges to the consumer's account without the consumer divulging his or her account number to evidence consent to the transaction.[427]

Industry commenters opposed the proposed provision, making a number of legal and factual arguments. Several industry members suggested that without specific legislative authority, the Commission could not prohibit the transfer of account information under the TSR.[428] A few commenters

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[426] AARP-NPRM at 6-7; AARP-Supp. at 4; EPIC-NPRM at 9; Horick-NPRM at 1 (endorsing EPIC's NPRM comment); NAAG-NPRM at 30-41; NCLC-NPRM at 12-13. *See also* Covington-Supp. at 2-5; and NCL-NPRM at 6 ("Checks and money orders are no longer the most common methods of payment in telemarketing complaints made to the NFIC. As NCL noted earlier, demand drafts, credit cards, debit cards, utility bills, and other types of accounts are increasingly used for payments. Sometimes consumers contend that they never provided their account numbers to the telemarketers; many of these complaints say they never even heard of the companies before they received their bills or bank statements.").

[427] NAAG-NPRM at 30; NCL-NPRM at 7. *See also* Covington-Supp. at 2-5.

[428] ATA-NPRM at 18 (arguing that, because the Telemarketing Act made no reference to preacquired account telemarketing, the Commission cannot regulate it); Cendant-NPRM at 6 (similar argument to ATA); CCC-NPRM at 8; DMA-NPRM at 41-42 (arguing that the Commission lacks authority under Telemarketing Act to establish a law violation based on unfairness standard); ERA-NPRM at 20 (same argument as DMA); Green Mountain-NPRM at 29-31; Household Auto-NPRM at 5; PMA-

argued that the Commission lacked record evidence sufficient to support the proposed prohibition.[429] It bears noting that, although business and industry representatives acknowledged during the Rule Review that the practice of preacquired account telemarketing was quite common, maintaining that it was "very important" to them, they provided scant information that would help to quantify the benefits conferred by this practice or better explain how these benefits might outweigh the substantial consumer harm it can cause.[430] By contrast, the record of consumer injury arising from preacquired account telemarketing scenarios was extensive at the time of the Rule Review.[431]

NPRM at 16 (same argument as DMA and ERA). Contrary to these assertions, the Commission has the authority to define and restrict deceptive and abusive telemarketing acts or practices, pursuant to the Telemarketing Act. Moreover, the Commission has analyzed proposed Rule provisions addressing abusive practices under the FTC Act's unfairness standard to narrow, not expand, the scope of activities brought under the purview of the statute. 67 FR at 4511. The unfairness standard requires that several specific elements be met before an act or practice may be deemed "unfair" under the FTC Act. See 15 U.S.C. 45(n) and discussion of § 310.4(a) above. If anything, the Commission is taking a more conservative approach in analyzing what constitutes an "abusive practice" than is required under the Telemarketing Act.

[429] DMA-NPRM at 39, 41; Household Auto-NPRM at 5; MPA-NPRM at 21-22.

[430] *See* 67 FR at 4512-14; and June 2002 Tr. II at 211-12 (E. Harrington) ("One of the reasons that the Commission has proposed a prohibition is because it looked very carefully at the record of the request for justification for the practice and found it is sorely wanting. Why this needs to happen, in other words, has been a real mystery to us, why it is that companies should be permitted to get account information from third parties and have it at the time that they call a prospective customer, charge that account information and oftentimes not obtain consent for that.").

[431] *See* 67 FR at 4512-14. Moreover, the evidence continues to mount as the Commission and states continue to bring law enforcement

Three arguments echoed throughout virtually all industry comments received in response to the NPRM. First, financial institutions, as well as other industry members, argued that the proposal was unnecessary or improper in light of the enactment of the GLBA and the various regulations thereunder.[432] Specifically, these commenters argued that the issue of releasing account information for marketing purposes already has been dispositively addressed in the GLBA and its implementing regulations, with a different result from that proposed by the Commission in the TSR.[433] Commenters

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actions involving these practices. *See, e.g.*, NAAG-NPRM at 30, n.73; Minnesota-Supp. *passim*; Illinois-Supp. *passim*.

[432] Advanta-NPRM at 3; Allstate-Supp. at 2; ABA-NPRM at 8; ABIA-NPRM at 1; AFSA-NPRM at 11-12; AmEx-NPRM at 4-5; ATA-Supp. at 5; Assurant-NPRM at 6; BofA-NPRM at 7; Bank One-NPRM at 2-3; Capitol One-NPRM at 8; Cendant-NPRM at 6-7; CBA-NPRM at 9; Citigroup-NPRM at 8-9; CCC-NPRM at 9; CMC-NPRM at 13; Discover-NPRM at 5-6; E-Commerce Coalition-NPRM at 2; Eagle Bank-NPRM at 4; FSR-NPRM at 7-8; Fleet-NPRM at 4-5; Household Auto-NPRM at 5; Household Bank-NPRM at 2, 7-9; Household Finance-NPRM at 2, 5; HSBC-NPRM at 3; KeyCorp-NPRM at 4; MasterCard-NPRM at 7; MBA-NPRM at 3; MBNA-NPRM at 5; Metris-NPRM at 2-4; NRF-NPRM at 21; PCIC-NPRM at 2; VISA-NPRM at 6; Wells Fargo-NPRM at 3; Letter from Reps. Ney, Sandlin, Jones, Cantor, and Shows to Chairman Timothy Muris, dated Apr. 15, 2002; Letter from Sens. Hagel, Johnson, and Carper to Chairman Timothy Muris, dated Apr. 17, 2002. See also Letter from Rep. Manzullo to Chairman Timothy Muris, dated Apr. 12, 2002 (suggesting that the blanket prohibition on transferring or receiving billing information "seems excessive"); and Letter from Sen. Inhofe to Chairman Timothy Muris, dated Mar. 22, 2002 (same).

[433] ABA-NPRM at 8; BofA-NPRM at 7; Bank One-NPRM at 2-3; CBA-NPRM at 9; Discover-NPRM at 5. *See also* CMC-NPRM at 14 ("We see no reason why financial institutions should be subject to any more stringent rules in connection with the use of consumer information for telemarketing purposes than for other purposes, and for this reason, we think the Rule should impose no more stringent limits on the sharing of billing information than the [GLBA and the Commission's privacy rule impose.").

noted that the various privacy regulations under the GLBA prohibit sharing account numbers with telemarketers, but provide exceptions for encrypted information, sale of an entity's own product through an agent, and co-branding and affinity programs. Thus, they argued, "since the proposed Rule fails to include these exceptions, it is inconsistent with the GLBA regulations, rendering the regulations irrelevant."[434] NAAG challenged these arguments, pointing out that the goals of the GLBA and the TSR are very different. NAAG expressed the view that the GLBA did not address the economic injury to consumers caused by preacquired account telemarketing, as it was focused on the privacy of account information; thus there is no conflict between the regulations, as they are aimed at different consumer harms.[435] According to NAAG:

> The essential characteristic of [preacquired account telemarketing] is the ability of the telemarketer to charge the consumer's account without traditional forms of consent. . . . The key is how the agreement between a company controlling access to a consumer's account and the telemarketer who preacquired the ability to charge a consumer's account affects the bargaining power between the telemarketer and the consumer. GLBA and implementing regulations do not address this relationship. . . . [Indeed as] a result of the [GLBA and implementing regulations] . . . vendors . . . can still send through charges to consumers' accounts without consumers giving their credit card numbers. . . . This

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[434] ABA-NPRM at 8. *See also* ABIA-NPRM at 2 (arguing that the proposed provision "would . . . disrupt a coordinated body of federal and state privacy laws and regulations enacted since passage of GLBA"); AFSA-NPRM at 11; AmEx-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3; Cendant-NPRM at 6-7; CMC-NPRM at 13.

[435] NAAG-NPRM at 41-43.

> allows the same [preacquired account telemarketing] process to continue. . . .[436]

Another common theme in industry comments on this issue was that the use of preacquired account information in telemarketing provides protection for consumers from identity theft perpetrated by individual telemarketing agents, and assuages consumers' concerns about divulging their account information.[437] According to one such commenter, having consumers provide billing information over the telephone:

> will actually operate to introduce account numbers into broader circulation. As customers provide account numbers, employees of telemarketers, processors and others in the distribution chain may have access to them. This practice will actually increase the chances for unauthorized use. . . . Sophisticated encryption processes keep account numbers out of circulation, and out of the hands of potential unauthorized users.[438]

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[436] *Id.* at 43. *Accord* Covington-Supp. at 2-5.

[437] NPRM at 7; Bank One-NPRM at 3-4; Capital One-NPRM at 9; Cendant-NPRM at 7; Household Auto-NPRM at 2, 5; Household Bank-NPRM at 2, 7; Household Finance-NPRM at 2, 7; MasterCard-NPRM at 7; MPA-NPRM at 24; Metris-NPRM at 2, 5-7; NRF-NPRM at 20; Time-NPRM at 8-9; VISA-NPRM at 6-7; Wells Fargo-NPRM at 3. See also June 2002 Tr. II at 124-25 (CCC); Id. at 133 (PMA) and 194-95 (DialAmerica).

[438] AmEx-NPRM at 8. Accord Assurant-NPRM at 5; Bank One-NPRM at 3-4. Additionally, several commenters suggested that the blanket prohibition was "inconsistent with the longstanding and well considered advice [of the Commission and other consumer protection groups and law enforcement agencies] that they not release their account numbers to telemarketers. . . ." MasterCard-NPRM at 7. Accord BofA-NPRM at 7; Bank One-NPRM at 3. See also ABA-NPRM at 8; Metris-NPRM at 6. In fact, the Commission's advice has not been to refuse to divulge account information in any telemarketing transaction, but rather only to divulge such information when the seller is known to the consumer. *See, e.g.*, "Facts for Consumers: Are You a Target of . . . Telephone Scams," http:// www.ftc.gov/bcp/confine/pubs/tmarkg/

A number of commenters pointed out that the GLBA implementing regulations assume the confidentiality benefits of transferring encrypted account information so that consumers would not have to provide such information during the marketing transaction.[439] Other commenters noted some contradiction in industry's identity theft argument, suggesting it is illogical to assert that a telemarketer cannot be trusted with a consumer's account information, but that same telemarketer can be trusted to tell the seller truthfully that the consumer has provided express informed consent to the purchase, absent obtaining any part of the account number from the consumer.[440] One such commenter further suggested that the best protection against individual telemarketers per-

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target.htm; and "Consumer Alert: Customized Cons Calling," http://www.ftc.gov/bcp/confine/pubs/alerts/ consalrt.htm. Moreover, the reason for this advice is not to avoid identity theft, but to protect consumers from fraudulent telemarketers selling bogus goods or services. *Id.* In the identity theft context, the danger identified by the Commission and discussed in its publications is not the potential misuse of account information that a consumer has provided in the course of a sale of goods or services, but rather "pretexting"—*i.e.*, the practice of eliciting a consumer's personal information under false pretenses, such as claiming to be from the consumer's bank, calling to confirm the consumer's account information. *See* "Pretexting: Your Personal Information Revealed," http://www.ftc.gov/bcp/confine/pubs/ credit/pretext.htm.

[439] Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; Metris-NPRM at 5; E-Commerce Coalition-NPRM at 3; VISA-NPRM at 6-7.

[440] June 2002 Tr. II at 130-31 (AARP), 143 (NAAG), and 205 (NCL). Indeed, in both their Rule Review and NPRM comments, NAAG provided several examples of instances where obviously confused elderly consumers were charged for products or services using preacquired account information, despite no clear evidence of consent during the telemarketing call. NAAG-RR at 11 and Exs. 2-4 attached thereto; NAAG-NPRM at 32, and Ex. B attached thereto. *See also* Synergy Global-NPRM at 1-2 (comments from a former teleservices agent stating that he was encouraged by his superiors to "falsify sales in an attempt to artificially inflate the statistics compiled nightly").

petrating identity theft is proper screening, training, monitoring and supervision of salespeople.[441] In addition, the vast majority of non-cash transactions in both telemarketing and face-to-face retail situations entail the consumer's disclosure of his or her account number to the seller's representative.[442] The record does not reveal any reason to support the notion that the risk of identity theft is any different in these transactions than in transactions where the seller has opted to make use of preacquired account information.

The third recurring theme in industry comments on this issue was the existence of a variety of efficiencies for both sellers and consumers. Among the most common examples cited was avoiding error in the transmission of account numbers from consumer to telemarketer, as either the consumer misstates or the telemarketer miskeys the account number.[443] Another benefit cited by numerous industry commenters was the reduction of time on the telephone to complete the transaction in the initial call,[444] particularly in

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[441] NCL-NPRM at 7.

[442] NAAG-RR at 10. Indeed, NEMA described its own current procedures, under the Uniform Business Practices guidelines created for the retail energy market, whereby it obtains complete billing information directly from each customer as proof of the customer's intent to switch utility providers. NEMA-NPRM at 8-9.

[443] ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7; Cox-NPRM at 33; Metris-NPRM at 7.

[444] *See, e.g.*, MPA-NPRM at 24 ("The Commission must also not underestimate the economic efficiencies such practices afford to businesses. . . . It is estimated that requiring consumers to retrieve and repeat their entire account number and verifying this information will increase the length of the call substantially, with one provider estimating an increase of 35 seconds and additional evidence suggesting that increase could be 60 seconds or more.") *See also* Cox-NPRM at 33; Metris-NPRM at 6-7; NCTA-NPRM at 12; Tribune-NPRM at 8. MPA's argument on this point is somewhat contradicted by its recommended alternative to the prohibition, express verifiable authorization, which involves additional

upsells.[445] As DMA noted, "it is a significant benefit to consumers for second businesses in an upsell to obtain and use information such as address and credit card information. This eliminates the need for a consumer to have to restate the information just provided. Transfer of information in such scenarios with informed consent is inherently efficient for both the merchant and the consumer."[446] The final benefit cited in several comments was that preacquired account telemarketing helped consumers by enabling them to avoid the inconvenience of having to pull out their wallets in order to make a purchase.[447] This alleged benefit was sharply questioned by consumer advocates, who argued that whatever time savings or convenience may accrue from the use of preacquired account information does not offset the potential harm from its use.[448] The record makes clear, in fact, that it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of

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expense, regardless of the method of express verifiable authorization selected. *See* MPA-NPRM at 26-29. NCL challenged this proposition, suggesting that, on the contrary, "[r]equiring telemarketers to ask for [the consumer's account number] would benefit both parties by helping to confirm a consumer's intention to make the purchase and the correct account that will be used for that purchase, reducing the potential for billing disputes later." NCL-NPRM at 7.

[445] Associations-Supp. at 5-6; DMA-NPRM at 40. *See also* PMA-NPRM at 18-19; Time-NPRM at 8.

[446] DMA-NPRM at 40. See also Time-NPRM at 8.

[447] Assurant-NPRM at 6; June 2002 Tr. II at 125 (CCC).

[448] *See, e.g.*, June 2002 Tr. II at 131 (AARP) ("To imply that . . . it's more inconvenient for the consumer to get their credit card than to have an unknown source debit their account without their knowledge, I don't think any consumer would ever agree with that statement.")

ensuring that a consumer has indeed consented to a transaction.[449]

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[449] Covington-Supp. at 2-5:

> "The Commission is also correct that the best way to be certain that a consumer really wants to make a purchase is to see if the consumer is willing to reach into a purse or pocket, open a wallet, take out a credit card, and read from it. When that happens, there is nothing ambiguous about what's taking place; there can be no misunderstanding. . . . Even during a chaotic dinner hour, a consumer cannot open a wallet, pull out a credit card, and read from it without knowing that he or she is making some kind of purchase . . . . This short-hand method for consumers to signal assent to a deal leaves complete control of the transaction in the hands of the consumer while preventing the industry burden from being any greater than necessary."

Indeed, this conclusion derives from the actual experience of a telemarketing firm that engages in preacquired account telemarketing. See Letter from Stephen Calkins to the FTC, dated October 28, 2002 ("Calkins Letter"). This firm attempted to cure the high customer return rates generated by this practice in several ways, including adjusting the disclosures and reading at least four digits of the account number to the consumers during the call. *Id.* at 2. The firm found that none of these attempted cures ensured that consumers "knowingly consented" to the purchase while maintaining a competitive level of sales. *Id.* at 1-2. Only when the firm began requesting a portion of the account number from the consumer herself did complaint rates drop significantly, without an unacceptable drop in sales. According to the commenter, "Sales were about 25% lower than when the telemarketer read those digits to the consumer, but consumers really understood that they were making purchases . . . . My client believes that consumer complaints pertaining to their intent to purchase dropped, and that his seller clients now experience an acceptable level of product returns." *Id.* at 2-3. *See also* June 2002 Tr. II at 139-44 (NAAG); NACAA-NPRM at 6 ("That the consumer has to provide this information to the seller provides a check on the transaction, and an assurance that the consumer does indeed wish to enter the transaction."); Vermont-Supp. *passim* and attachment. AARP commissioned a survey by telephone on June 14-19, 2002, among a nationally representative

As it stated in the NPRM, the Commission still believes that whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer's account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted. In such a case, what is customarily under the sole control of the consumer—whether to divulge one's account number, thereby determining whether to accept the offer and how to pay for it—is now in the hands of the seller or telemarketer.[450] This reversal in the traditional para-

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sample of 1,240 respondents 18 years of age and older. Participants were asked a handful of questions, such as, "Often telemarketers ask you to buy something with a credit card or debit card. Do you think telemarketers are able to cause charges to your credit card or debit card without getting your credit or debit card numbers directly from you?" Only 30 percent of respondents stated that they were aware that telemarketers have the ability to cause a charge to their credit or debit card accounts without getting the account numbers from them. AARP-Supp. at 2. That number was higher in the instance of upsells, but still less than half of the respondents understood that it was possible to be charged without providing account information to a seller or telemarketer. *Id.* Additionally, the majority (80 percent) of respondents stated that they thought telemarketers should only be able to cause charges to their credit or debit card accounts if the consumers expressly provide their account numbers to the seller or telemarketer. *Id.* at 4; Vermont-Supp. at 2-3. The survey addresses a fairly complex issue in broad terms. For example, it does not tease out the specific instances where a consumer might actually have an expectation that the seller will retain and reuse the consumer's account information, such as the contact lens seller who, with the consumer's permission, retains the consumer's account information to facilitate quarterly lens purchases. The results do, however, provide insight into the general expectations of consumers when engaging in telemarketing transactions.

[450] State law enforcers, consumers and consumer groups, as well as some industry members, consistently voiced concerns over the shift of control over a transaction from the consumer to the seller or telemarketer,

digm is not one that is generally expected or favored by consumers, who consistently state that, as a general proposition, they do not believe it is or should be possible for them to be charged if they do not provide their account number in a transaction.[451] The Commission understands this to mean

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and noted consumer disbelief that purchases could actually be made without their ever disclosing payment information. *See* 67 FR at 4513; June 2002 Tr. II at 130-32 (AARP); Covington-Supp. at 2, 5; EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; June 2002 Tr. II at 139-44 (NAAG). But see CMC-NPRM at 13 (questioning this proposition).

[451] *See* 67 FR at 4513; AARP-Supp. at 4 (*see* note 449 above, describing survey showing that the majority of consumers do not believe their accounts can, or should, be charged by telemarketers without obtaining the account number directly from the consumers); June 2002 Tr. II at 131-32 (AARP); EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; Vermont-Supp. at 2-3. As Minnesota explained during the June 2002 Forum:

> "In a preacquired situation, the consumer doesn't have that control because we have shorthand ways of signaling consent in our society. We aren't many lawyers out there. Josh, who . . . has a trade school degree and comes home from a job and Esther is sitting on the couch at 85 years old doesn't understand all this. . . . They just get a call from somebody. What they know is I've got to sign my name, I've got to give somebody my credit card or in the context of a telemarketing transaction, I have to read my account number to the person or I have to pay cash, and what this does is by circumventing those forms of consent, it makes it impossible for consumers to control the transactions."

June 2002 Tr. II at 140. See also James Andris (Msg. 171) ("Our mortgage company has been deducting a monthly premium, via our mortgage payment, to a 3rd party insurance policy. I have written a letter demanding refunds for the payments for 16 months. We, my wife and I, never gave written or verbal permission for such payments to either parties [sic]."); Albert Bruce Crutcher (Msg. 229) ("I also favor not allowing my credit card and account numbers to be given out by anyone other than ME!!"); Harold D. Howlett (Msg. 300) ("Do not allow telemarketers to obtain and use credit card or other account information from anyone except the

that, generally speaking, consumers believe they ordinarily signal their consent to an offer by providing their account information to the seller or telemarketer.

Although some commenters argue that this shift in the normal paradigm of offer and acceptance is, in and of itself, inherently unfair,[452] the record overall suggests that, in general, it is not preacquired account telemarketing per se that is harmful, but rather the abuse of preacquired account information that causes the harm.[453] Commenters persuasively note that there are many transactions involving preacquired account information that are beneficial to, indeed sometimes expected by, consumers. For example, as noted in the NPRM, "a customer who places quarterly orders for contact lenses by calling a particular lens retailer may provide her billing information in an initial call, with the understanding and intention that the telemarketer will retain it so that, in any subsequent call, the retailer has access to this billing information."[454] Similarly, a customer who provides his account number to make a purchase in an initial telemarketing transaction may be frustrated to have to repeat that account information to consummate certain upsell transactions, particularly when the upsell is offered by the same telemarketer.

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consumer. . . ."); Carole & Cory Walker (Msg. 810) ("Every year we have at least one unauthorized charge to our card and we are extremely cautious with our information.").

[452] *See, e.g.*, EPIC-NPRM at 9; NAAG-NPRM at 30; NCL-NPRM at 5-7.

[453] ERA-NPRM at 16; Household Auto-NPRM at 5; PMA-NPRM at 17. Other commenters asserted that using preacquired account information is not inherently fraudulent. *See* Allstate-Supp. at 2; Associations-NPRM at 4; ATA-NPRM at 19; ATA-Supp. at 5-6; ERA/PMA-Supp. at 10; ITC-NPRM at 5; NCTA-NPRM at 11; Noble-NPRM at 3; NATN-NPRM at 3; NSDI-NPRM at 3; PMA-NPRM at 13-16; Technion-NPRM at 4; TRC-NPRM at 3; Time-NPRM at 7.

[454] 67 FR at 4513.

In that case, there may be an expectation that the telemarketer will have retained, and be able to reuse, the account information the customer provided only moments ago.[455] As another commenter pointed out during the Rule Review, the key to such transactions is the fact that the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and reused for an additional purchase, should the consumer consent to that purchase.[456]

The record shows that the specific harm resulting from the use of preacquired account telemarketing is manifested in unauthorized charges.[457] These may appear not only on con-

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[455] *See*, e.g., June 2002 Tr. II at 196 (Time) ("[T]he catalog clients that we deal with that are . . . selling our magazines on our behalf . . . tell us that the cost would be loss of sales of the catalog products because the customers would just be so annoyed about having to give the credit card number again that they just gave.")

[456] 67 FR at 4513, n.196.

[457] In its supplemental comment, Minnesota argued that evidence gathered in its law enforcement actions showed that consumers consistently stated that they had not authorized charges arising out of preacquired account telemarketing, particularly when the offers involved "free-to-pay conversion" features:

> "The data we have reviewed in our investigations uniformly supports our impression that underlying the high cancellation rates with preacquired account telemarketing is consumer sentiment that the charges were unauthorized. In addition to the survey of Fleet Mortgage Corporation customer service representatives presented in the prior NAAG Comments [see NAAG-NPRM at 31-32], an investigation of a subsidiary of another of the nation's largest banks revealed a similar pattern. During a thirteen month period, this bank processed 173,543 cancellations of membership clubs and insurance policies sold by preacquired account sellers. Of this number of cancellations, 95,573, or 55 percent, of the consumers stated unauthorized billing as the reason for the request to remove the charge. The other primary reason given for canceling (by 56,794 customers, or 32% of the total) was a general "request to cancel" code that

sumers' credit card or checking accounts, but also on mortgage statements and other account sources not traditionally used to pay for purchases.[458] Of course, unauthorized charges are not exclusively associated with preacquired account telemarketing. The Commission has brought numerous law enforcement actions against sellers and telemarketers alleging violations of the FTC Act for the unfair practice of billing unauthorized charges to consumers' accounts in a variety of contexts not involving preacquired account information, including but not limited to: advanced fee credit card offers,[459] sweepstakes,[460] vacation or travel packages,[461] credit card loss protection offers,[462] and magazine subscriptions.[463] Thus,

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may have also included many consumers claiming unauthorized charges."

Minnesota-Supp. at 4.

[458] NAAG-NPRM at 31 ("Fleet Mortgage Corporation, for instance, entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using preacquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner's mortgage account.")

[459] *See, e.g., FTC v. Corporate Mktg. Solutions*, No. CIV-02 1256 PHX RCB (D. Ariz. filed July 8, 2002); FTC v. Capital Choice, No. 02-21050-CIV-Ungaro-Benages (S.D. Fla. filed Apr. 15, 2002); *FTC v. Fin. Servs. of N. Am.*, No. 00792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. SureCheK Sys., Inc.*, No. 1:97-CV-2015-JTC (N.D. Ga. filed July 9, 1997); *FTC v. Thornton Communications, Inc.*, No. 1 97-CV-2047 (N.D. Ga. filed July 14, 1997).

[460] *See, e.g., FTC v. New World Servs., Inc.*, No. CV-00-625 (GLT) (C.D. Cal. filed July 5, 2000); *FTC v. Hold Billing, Ltd.*, No. SA-98-CA-0629-FB (W.D. Tex. filed July 15, 1998).

[461] *See, e.g., FTC v. Lubell*, No. 3-96-CV-80200 (S.D. Iowa filed Dec. 1996); *FTC v. Disc.* Travel, No. 88-113-CIV-FtM-15C (M.D. Fla. filed Aug. 8, 1988); *Citicorp Credit Servs.*, 116 F.T.C. 87 (1993).

[462] *See, e.g., FTC v. Andrews*, No. 6:00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 2000); *FTC v. First Capital Consumer Membership Servs.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Consumer*

in essence, preacquired account telemarketing has proven in certain circumstances to be an additional, but not the only, vehicle for imposing unauthorized charges on consumers in telemarketing transactions.

One of the problems, therefore, with the proposed prohibition on receiving billing information from a source other than the consumer or sharing it with others for the purposes of telemarketing is that it fails to remedy patterns of unauthorized billing that occur even though preacquired account information is not used. As our cases amply demonstrate, the practice unequivocally meets the criteria for unfairness, and therefore violates Section 5 of the FTC Act.[464] Yet until now, the Rule has not specified that unauthorized billing is an abusive practice and a Rule violation.[465] The Commission therefore has decided to add § 310.4(a)(6) to correct that deficiency. The new provision specifies that it is an abusive practice and a violation of the Rule to cause a charge to be

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Repair Servs., Inc., No. 00-11218 CM(RZx) (C.D. Cal. filed Oct. 23, 2000); *FTC v. Capital Card Servs.*, No. CV 00 1905 PHX EHC (D. Ariz. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs.*, No. 00CV0905C(F) (W.D.N.Y. filed Oct. 26, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00-CV-906 (W.D.N.Y filed Oct. 23, 2000); *FTC v. OPCO Int'l Agencies, Inc.*, No. CO1-2053R (W.D. Wash. filed Feb. 2001).

[463] *See, e.g., FTC v. Diversified Mktg. Servs. Corp.*, No. 1:96-CV-615-FM. (W.D. Okla. filed Mar. 12, 1996); FTC v. Windward Mktg., No. 1:9 6-CV-615-FM. (N.D. Ga. filed May 26, 1996); *FTC v. S.J.A. Soc'y*, No. X97 0061 (E.D. Va. filed May 1997).

[464] *See* discussion and note 400 above of § 310.4 generally, and 67 FR at 4511, regarding the Commission's determination that, in specifying practices as abusive when they do not directly implicate the privacy concerns embodied in the Telemarketing Act, it will demand that the practice meet the criteria for unfairness codified in § 5(n) of the FTC Act, 15 U.S.C. 45(n).

[465] Section 310.3(a)(4) specifies that it is a deceptive practice to make "a false or misleading statement to induce any person to pay for goods or services."

submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. This prohibition is not limited to instances of unauthorized charges resulting from preacquired account telemarketing. Rather, this provision is applicable whenever a seller or telemarketer subject to the Rule causes a charge to be submitted against a customer's or donor's account without obtaining the customer's or donor's express informed consent to do so. This broader prohibition on unauthorized billing is supported by the Commission's extensive law enforcement record of instances of unauthorized billing in telemarketing transactions.

Section 310.4(a)(6) also specifies that, in every transaction, the seller or telemarketer must obtain the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account. "Express" consent means that consumers must affirmatively and unambiguously articulate their consent. Silence is not tantamount to consent; nor does an ambiguous response from a consumer equal consent.[466] Consent is "informed" only when customers or donors have received all required material disclosures under the Rule, and can thereby gain a clear understanding that they will be charged, and of the payment mechanism that will be used to effect the charge. Of course, the best evidence of "consent" is consumers' affirmatively stating that they do agree to purchase the goods or services (or make the donation), identifying the account they have selected to make the purchase, and providing part or all of that account number to the seller or telemarketer for payment purposes (not for purposes of "identification," or to prove "eligibility" for a prize or offer, for example). But in most instances, the Commission leaves it up to sellers to determine what procedures to employ in order to meet the

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466 *See* Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy—consent.html ("ERA Guidelines").

requirement for obtaining express informed consent. As explained below, however, in certain particularly problematic scenarios, the Commission does impose specific procedures.

Having treated the overall problem of unauthorized billing in new § 310.4(a)(6), the Commission has included additional subsections to address problems particularly associated with preacquired account telemarketing. As noted in the NPRM, evidence shows that, at least to date, unquestionably the greatest risk of harm (*i.e.*, unauthorized charges) to consumers is associated with telemarketing involving the combination of preacquired account information with an offer involving a "free-to-pay conversion."[467] NAAG describes the "free-to-pay conversion" offer (which it refers to as an "opt-out free trial" offer) as the "constant companion" of the preacquired account telemarketer in state law enforcement efforts to date.[468] Indeed, as of the date of this notice, all of

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[467] The Commission has inserted a definition of "free-to-pay conversion" at § 310.2(o) of the amended Rule, which states that "free-to-pay conversion" means: "in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period." *See* discussion of § 310.2(o) above.

[468] NAAG-NPRM at 32. Accord AARP-NPRM at 6. CCC attempted to counter this finding by presenting the results of a survey, conducted on behalf of MemberWorks, in April of 2001 by the Luntz Research Companies (the "Luntz Survey"). CCC-NPRM at 10; June 2002 Tr. II at 127; MemberWorks-Supp. passim. In the survey, the caller told the consumer that the caller would read an offer, and would ask for the consumer's reaction. So, it was clear to the consumer that he or she was not buying anything, and instead that the consumer should listen carefully to the terms of the offer so that he or she could answer the caller's questions. Then, the caller read a script involving a "free-to-pay conversion" feature (the script was not submitted with the survey results for the public record). The caller then asked several questions about what the consumer just heard. CCC argued that the results of this survey showed that 85 percent of the respondents said the billing methods were

the law enforcement actions taken by the Commission and by the states that involved telemarketing using preacquired account information also involved an offer with a "free-to-pay conversion" feature.[469]

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understandable, and that the seller was acting fairly. CCC-NPRM at 10. Examination of the Luntz survey in greater detail suggests that the survey does little to support these assertions. First, in fact, none of the respondents said that the billing methods were understandable. According to the survey, 52 percent of the respondents said the billing methods were "mostly" understandable, while 33 percent said they were "somewhat" understandable, and 13 percent said they were not understandable. This means that at least 46 percent of the respondents did not even "mostly" understand the way in which they would be billed after listening carefully to a sales offer involving preacquired account information and a "free-to-pay conversion" feature. *See* MemberWorks-Supp. at 1. In addition, after asking whether the billing methods were understandable, the callers asked two questions structured in ways that strongly suggested the desired result: first they asked, "And if you *agree to join*, and receive a welcome kit with all of the rules in writing, who is responsible *if you forget to cancel* and are billed," then "*If the company tells you three times on the telephone call and then tells you twice in writing that you can cancel* your program membership anytime, but if you don't cancel, you will be charged, is the company acting fairly or not." *Id.* (emphasis added). Moreover, regardless of the merits of the survey results, they do little to offset the extensive evidence of consumer injury from this practice, the continuing flow of complaints into the offices of consumer groups and law enforcement officials at both the state and federal levels, and the AARP survey evidence of consumer perceptions and opinions about preacquired account telemarketing. *See* notes 424-25 and 449 above.

[469] For example, MemberWorks, Inc. (Assurances of Discontinuance with the States of Nebraska and New York; Consent Judgments with the States of California and Minnesota) (primarily "free-to-pay conversion" membership clubs); BrandDirect Mktg. Corp. (Assurances of Discontinuance with the States of Connecticut and Washington) ("free-to-pay conversion" membership clubs); Cendant Membership Servs. (Consent Judgment with State of Wisconsin) (same); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York) (same); Damark Int'l, Inc. (Assurances of Discontinuance with States of Minnesota and New York) ("free-to-pay conversion" buyers club); *Illinois v. Blitz Media,*

It is noteworthy that the coupling of preacquired account information with a "free-to-pay conversion" offer is not limited to outbound telephone calls. In *FTC v. Smolev*,[470] for example, the defendants were alleged to have lured consumers to call by offering an inexpensive lighting product in general media advertisements, obtaining account information from the consumer in the initial transaction, and then upselling a "free-to-pay conversion" buyers club membership.[471] In fact, the majority of companies that have been targeted by state or FTC law enforcement action market their "free-to-pay conversion" products or services via upsells, sometimes exclusively, and other times also using outbound telephone calls.[472]

Inc., No. 2001-CH-592 (Sangamon County) ("free-to-pay conversion" membership club); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance) ("free-to-pay conversion" magazine subscription); Triad Discount Buying Service (sued by 29 states and the Commission) ("free-to-pay conversion" membership clubs); *Minnesota v. U.S. Bancorp*, Inc., No. 99-872 (Consent Judgment, D. Minn) (account information provider to seller/telemarketer of "free-to-pay conversion" membership/buyers clubs); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (same, plus insurance packages); *FTC v. Technobrands, Inc.*; No. 3:02-cv-00086 (E.D. Va. 2002) ("free-to-pay conversion" membership clubs); *U.S. v. Prochnow*, No. 1:02-cv-917-JLF (N.D. Ga. 2002) (inbound calls from direct mail solicitations, upsold "free-to-pay conversion" membership clubs).

[470] (a/k/a Triad Disc. Buying Serv.) No. 01-8922 CIV ZLOCH (S.D. Fla. 2001).

[471] Thus, the assertion of some commenters that "the potential for abuse or confusion as to where the [account] information was obtained does not exist in upsells," see, e.g., ANA-NPRM at 6, is not supported by the record, at least in the context of offers with a "free-to-pay conversion" feature, as was the case in *Smolev*.

[472] Unfortunately, the argument made by several commenters that the abusive use of preacquired account information is limited to a discrete number of bad actors (see ATA-NPRM at 19; ERA-NPRM at 16; MPA-NPRM at 23-24) is not supported by the record. Law enforcement actions

Consequently, the Commission has determined that in any transaction involving both preacquired account information and a "free-to-pay conversion," the evidence of abuse is so clear and abundant that comprehensive requirements for obtaining express informed consent in such transactions are warranted.[473] Specifically, § 310.4(a)(6)(i) provides that a seller or telemarketer making an offer involving both pre-acquired account information and a "free-to-pay conversion" must (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged; (2) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account for which the consumer provided the four digits; and (3) make and maintain an audio recording of the entire telemarketing transaction. Thus, in every instance where the combination of preacquired account information and "free-to-pay conversion" is involved in a telemarketing transaction, the customer must be required to reach into his or her wallet, and provide at least a portion of the account number to be charged.[474] It must be clear that the customer is providing that

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alleging injuries caused by abuses of preacquired account telemarketing have been brought against well-known, national companies and financial institutions, including but not limited to: U.S. Bancorp, Fleet Mortgage Corporation, MemberWorks, Ticketmaster, and Time. *See* NAAG-NPRM at 30, n.73.

[473] NAAG recommended prohibiting the use of preacquired account information, even if that information was previously obtained by the same seller or telemarketer from the consumer, in solicitations involving a "free-to-pay conversion" feature. NAAG-NPRM at 39. The Commission declines to adopt this recommendation at this time, and is confident that the solution adopted will provide consumers the information and command over these transactions they need to protect themselves from unauthorized charges.

[474] *See* note 449 above. Moreover, industry's argument that there is no evidence of problems where there is a transfer of account information ["after consent" is belied by the record of law enforcement actions in this area. *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla.

account number to authorize a purchase. This means that, at a minimum, the disclosures required in § 310.3(a)(1) in general, and also § 310.3(a)(1)(vii) in particular, must be provided to the customer before the customer provides express informed consent—which, in the case of preacquired account telemarketing and a "free-to-pay conversion" feature, means before the customer provides account information and express agreement to be charged for the goods or services on the account provided. It must also be clear that the customer agrees that the charge be placed on the account whose digits the customer provided. The Commission expects that, to comply with this requirement, the seller or telemarketer shall expressly identify the account to be charged, and inform the customer that it possesses the customer's account number already, or has the ability to charge that account without obtaining the full account number from the customer.

Finally, the Commission is requiring that the entire sales transaction be recorded. The record evidence shows that it is not adequate in offers involving both preacquired account information and "free-to-pay conversions" to record a portion of the call that allegedly includes some or all of the required disclosures regarding cost and payment.[475] Often, what law enforcement efforts have gleaned is that the necessary disclosures are grouped together during the "verification" process, at the end of a lengthy telemarketing pitch during which consumers are led to reasonably believe that they are not committing to a purchase. As one commenter explained:

> [C]onsumers are led to believe that they are agreeing to accept materials in the mail, preview a program along

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2001). In fact, in virtually all of the state and federal law enforcement actions in this area, consumers stated that they did not recognize the billing entity or understand how that seller obtained their account information. *See* notes 450-51 above.

[475] NAAG-NPRM at 32-33 (discussing ineffectiveness of verification).

> with a free gift, or the like. As one telemarketer explicitly stated in its scripts: 'we're sending you the information through the mail, so you don't have to make a decision over the phone.' Only at the tail end of a lengthy call does the telemarketer obliquely disclose that the consumer's preacquired account will be charged. By this time, many consumers have already concluded that they understood the deal to require their consent only after they review the mailed materials. . . . Preacquired account telemarketing verification taping typically is preceded by statements suggesting that the taping is 'to prevent clerical error' and critical information is revealed in ways that many consumers will not grasp at the end of a conversation.[476]

Thus, not only the material terms provided the consumer, but also the context and manner in which the offer is presented are vital to determining that the consumer's consent is both express and informed. Moreover, consumers' confusion about the nature of "free-to-pay conversion" offers—particularly in the context of preacquired account telemarketing—is evidenced by the steady stream of complaints, as well as evidence uncovered in law enforcement actions by the states.[477] Further, the record contains compelling evidence of cancellation patterns for membership programs offered on a "free-to-pay conversion" basis in preacquired account telemarketing transactions. As explained by the Minnesota Attorney General,

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[476] *Id.*

[477] *See* Illinois-NPRM at 2 (In Illinois' lawsuit against Blitz Media, Inc., the attorney general initially received 146 consumer complaints. After initiating the litigation, the Illinois attorney general found that approximately 45,000 Illinois consumers had been enrolled in Blitz Media's buyers club, but only about 8,000 of them remain "active" members of the buyers club, since the rest had discovered these charges and cancelled the membership, or initiated a chargeback, claiming the charge was unauthorized.).

> [c]onsumers canceling within the 30-day free trial period likely indicate that [they] understood (either during the phone call or with the follow-up material or both) the terms of the deal. If all consumers understood the free trial offer, one would expect to see a significant cancellation rate within the 30 day free trial offer period followed by a scattered pattern of later cancellations. The data we have reviewed [from two financial institutions of cancellation dates relative to date of enrollment for Minnesota consumers charged by the institutions as a result of preacquired account telemarketing transactions involving a "free-to-pay conversion"] suggest this is not the typical pattern. . . . The overall pattern of [the data from each institution] is strikingly similar. The largest concentration of cancellations occurs immediately after the free trial period but coincident with the first account charge for the service. The cancellation rate in the free trial period is less than half the cancellation rate in the 31-90 day period, when consumers have been billed for the service. This result is consistent with the pattern of consumer complaints alleging unauthorized charges received by Attorneys General and with the data suggesting that most consumers cancel these charges because they believe they are unauthorized.[478]

Consequently, to ensure that the consent provided by the consumer is not only "express" but is also "informed" in this limited, but problematic, context of "free-to-pay conversion" features in preacquired account telemarketing offers, the amended Rule requires that an audio recording of the entire transaction, from start to finish, be created and maintained. A

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[478] Minnesota-Supp. at 4-5. One industry commenter submitted the results of a telephone survey, which it asserted showed that consumers do, in fact, understand the terms of these "free-to-pay conversion" features. *See* note 469 above. The data received in litigation from the institutions participating in these telemarketing campaigns, however, belies the purported conclusions of this survey. *See* note 457 above.

handful of commenters argued that such audio recording would be prohibitively expensive, particularly in the inbound context, where some sellers and telemarketers have not traditionally recorded the telemarketing calls.[479] Given the narrow category of calls to which this requirement applies, and the rapidly growing use of inexpensive and efficient digital audio recording technology,[480] the Commission believes that this requirement will not pose a significant burden to sellers and telemarketers who freely choose to market their goods or services using a "free-to-pay conversion" feature and preacquired account information. Moreover, the record is compelling that any incremental costs to industry of these requirements are likely outweighed by the benefit to consumers of curtailing the practice as it is currently employed in the marketplace.

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[479] ERA/PMA-Supp. at 3, 7 ("We understand from certain of our members that imposing the record keeping requirement[s] on inbound [upsells] may require substantial investments of money and resources to develop the systems necessary to comply with these requirements.").

[480] *See* generally Contract Digital Recorder, by Data-Tel Info Solutions, at http://www.datatel-info.com/digicorder.html (describing affordable digital recording system for telemarketing operations); Veritape Call Centre-Case Study 2, at http://www.veritape.com/veritape/vtcccase.htm (describing a US call center that saved $70,000 annually by switching from analog taping process to digital recording); Ron Elwell, *Streamlining Call Center Operations*, Teleprofessional, Sept. 1998, at 130-34 (discussing "how CTI-enabled digital recording technology is helping call centers of all types be more productive and profitable"); Teleprofessional, Inc., *CCPN's System Owner Shootout*, CALL CENTER PRODUCT NEWS, Fall 1998, at 52-54, 56 (explanations by several telemarketers' systems professionals of savings and efficiencies experienced using improved digital recording and monitoring systems); Michael Binder, *The Evolution of Digital Recording in the Call Center*, TELEMARKETING & CALL CENTER SOLUTIONS, Nov. 1997, at 38. *Cf.* Duncan Furness, Choosing a Tape Technology, COMPUTER TECHNOLOGY REVIEW, Nov. 2000, at 40.

In addition to the requirements noted above, in any telemarketing transaction involving preacquired account information (but not a "free-to-pay conversion" feature), § 310.4(a)(6)(ii) specifically requires that the seller or telemarketer (1) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged, and (2) obtain from the customer or donor his or her express agreement to be charged for the goods or services *and* to be charged using the account number identified during the transaction. Again, the Commission intends this to mean that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the customer.

The Commission has taken a targeted approach in the amended Rule, focusing on the tangible harm caused by the practices identified as problematic in the rulemaking proceeding. It bears noting, however, that the Commission recognizes preacquired account telemarketing as an emerging practice, one that will receive close attention from the Commission, and, no doubt, the state Attorneys General. The Commission wishes to emphasize that, particularly in transactions involving "free-to-pay conversion" offers, so long as preacquired account information is involved, there exists that fundamental shift in the bargaining relationship discussed above, and therefore potential for abuse.[481] While the Commission is confident that the majority of industry members will abide by the new provisions, and that doing so will provide consumers the information and control needed to shield them from the abuses encountered in the past with these transactions, it also notes that the best practice in such circumstances is to ensure that the seller or telemarketer does

[481] NAAG-NPRM at 30; Covington-Supp. at 4-5.

not have the ability to cause a charge to a consumer's account without getting the account number from the consumer herself. This practice would, in effect, be self-enforcing, as the control over the transaction (absent misrepresentations by the telemarketer) would truly be with the consumer, where it belongs. Should it become apparent that the remedies imposed by the amended Rule are insufficient, or that preacquired account telemarketing practices have evolved further in such a way as to cause additional harm to consumers, the Commission will not hesitate to revisit its approach to the practice and revise the Rule accordingly.

Other Recommendations

Other than those commenters who suggested deleting the prohibition entirely,[482] industry commenters' primary recommenddation was to substitute the express verifiable authorization provision of § 310.3(a)(3), or some variation on a disclosure and "consent" requirement,[483] for the proposed blanket prohibition on the transfer of billing information.[484] The general theme was that disclosures and "consent" were sufficient to remedy the harm being caused consumers by the misuse of preacquired account information. It is unclear what these commenters mean by "consent" in this context, as they also recommended that sellers and telemarketers be permitted

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[482] ABA-NPRM at 8-9; ABIA-NPRM at 4; CMC-NPRM at 9-10; MBNA-NPRM at 6.

[483] *See, e.g.*, DMA-NPRM at 39-40 (specific to upselling) (the Commission "should instead require that notice of transfer of billing information be disclosed to the consumer and that consent be given by the consumer prior to the transfer").

[484] *See* ATA-NPRM at 20; ATA-Supp. at 5-6; CCC-NPRM at 11-12; ERA-NPRM at 24-25; ERA/PMA-Supp. at 11-15; ITC-NPRM at 5; MPA-NPRM at 26-29; MPA-Supp. at 5-6; NATN-NPRM at 3 (Supporting ERA Guidelines and recommendation); Noble-NPRM at 3 (same); NSDI-NPRM at 3 (same); PMA-NPRM at 19 (same). *See* also Associations-Supp. at 6.

to use any of the three existing avenues for achieving express verifiable authorization, including providing consumers a written confirmation after terminating the telephone call. In the context of "free-to-pay conversions," the record shows, in no uncertain terms, that disclosures are not sufficient to prevent widespread consumer injury.[485] Most sellers and telemarketers have been telling consumers at some point in the conversation, in greater or lesser detail, that they will be charged at some point for the goods or services being offered on a "free-to-pay conversion" basis; but, as noted above, these disclosures come late in the conversation, and do not resonate with consumers who understand "free" to mean "free" and that to obligate oneself to purchase something, the buyer must provide a payment mechanism to the seller.[486] Often, these disclosures come in writing in a "membership package" sent to the consumer some time after the call. Law enforcement experience has shown that these disclosures are meaningless to consumers—who either never receive the packets, or assume they are junk mail and discard them.[487] Moreover, in any telemarketing transaction, but most especially in preacquired account telemarketing, it is imperative that the seller or telemarketer ensure that the consumer actively, and unequivocally, provides his or her consent to be charged, and to be charged using a particular

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[485] Review of taped verifications obtained as evidence in the Commission's law enforcement actions and in similar state actions convincingly demonstrates the inadequacy of disclosures in this context.

[486] *See* NCL-NPRM at 7 ("Merely requiring telemarketers to disclose that they have already obtained the billing account information from another source or that they may share that information with other marketers would not provide consumers with adequate protection from abuse. Express verifiable authorization to use the billing account information is not enough in these instances because it comes into play after the fact; it does not give consumers prior knowledge of or control over who has their account information.").

[487] *See* discussion of § 310.3(a)(3)(iii) above.

payment mechanism. The Commission has determined, therefore, that prohibiting unauthorized charges, and laying out what is required to obtain express informed consent in certain circumstances, is the most appropriate solution not only to the harm caused by preacquired account telemarketing abuses, but also by other exploitative billing methods in telemarketing.

§ 310.4(a)(7)—Failing to transmit caller identification information

Section 310.4(a)(7) of the amended Rule addresses transmission of caller identification ("Caller ID") information. This section prohibits any seller or telemarketer from "failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call." A proviso to this section states that it is not a violation to substitute the actual name of the seller or charitable organization on whose behalf the call is placed for the telemarketer's name, or to substitute the seller's customer service number or the charitable organization's donor service number that is answered during regular business hours for the number the telemarketer is calling from or the number billed for making the call. Full compliance with the Caller ID provision will be required by January 29, 2004.

The record includes several key principles supporting the Commission's decision to adopt this approach to Caller ID information. First, transmission of Caller ID information is not a technical impossibility, as some commenters had argued or implied. Second, telemarketers are able to transmit this information at no extra cost, or minimal cost. Third, consumers will receive substantial privacy protection as a result of this provision.[488] Fourth, consumers and telemarketers will

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[488] EPIC-NPRM at 11-12.

both benefit from the increased accountability in telemarketing that will result from this provision.[489] Fifth, law enforcement groups will benefit from a vital new resource from the required transmission of Caller ID information in telemarketing.[490]

Background. The original Rule did not address the issue of Caller ID, or the feasibility or desirability of requiring telemarketers to transmit Caller ID information. During the Rule Review, however, the Commission received numerous comments from consumers and others expressing frustration about telemarketers' routine failure to transmit Caller ID information.[491] Commenters complained that when telemarketers called, consumers' Caller ID devices would show a phrase like "unknown," "out of area," or "unavailable," instead of displaying the name and telephone number of the telemarketer or seller on whose behalf the call was made.[492] Based on the Rule Review record, the Commission proposed in the NPRM to prohibit blocking, circumventing, or altering the transmission of Caller ID information.[493]

In support of this proposal, the Commission discussed in the NPRM the benefits that accrue to consumers from transmission of Caller ID information and the technical

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[489] Make-A-Wish-NPRM at 6; Associations-Supp. at 7; DialAmerica-Supp. at 2.

[490] Make-A-Wish-NPRM at 6; McClure-NPRM at 2; NACAA-NPRM at 9; NYSCPB-NPRM at 4; Patrick-NPRM at 2-3; TRA-NPRM at 11.

[491] *See, e.g.*, Baressi-RR at 1; Bell Atlantic-RR at 8; Blake-RR at 1; Collison-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

[492] *See, e.g.*, Baressi-RR at 1; Blake-RR at 1; Collison-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

[493] The Caller ID provision is found at § 310.4(a)(7) of the proposed Rule; discussion of the proposed Rule provision is found at 67 FR at 4514-16.

considerations implicated by transmission of this information.[494] Consumers benefit because Caller ID information allows them to screen out unwanted callers and identify companies that have contacted them so that they can place "do not call" requests to those companies. These features of Caller ID enable consumers to protect their privacy and are clearly within the ambit of the Telemarketing Act's mandate, set forth in 15 U.S.C. § 6302(a)(3)(A), to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of their right to privacy.[495] The fact that consumers greatly value the privacy protection provided by receipt of Caller ID information is evidenced by the fact that, as of the year 2000, nearly half of all Americans subscribed to a Caller ID service.[496]

The Commission noted in the NPRM the conflict in opinion during the Rule Review regarding the feasibility of requiring Caller ID transmission by telemarketers.[497] Based on its assessment of the information on the record at the close of the Rule Review, the Commission expressed its uncertainty that telemarketers using "T-1" trunk lines could transmit Caller ID information, and the Commission therefore

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[494] 67 FR at 4514-16. The Commission also asked whether trends in telecommunications might one day permit the transmission of full Caller ID information when the caller uses a trunk line or PBX system. *Id.* at 4538.

[495] 67 FR at 4514. DMA argued that the Commission lacks authority to require Caller ID transmission. DMA-NPRM at 48-49. However, the NPRM clearly explains that the harm to consumers that arises from failure to transmit Caller ID information falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. 67 FR at 4514-16. The Commission therefore rejects DMA's "lack of authority" argument.

[496] Dina ElBoghdady, Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes, WASH. POST, Sept. 8, 2002, at H 2.

[497] 67 FR at 4515.

did not at that time propose to mandate such transmission.[498] The NPRM also acknowledged telemarketers' argument that, even if they could transmit Caller ID information, they would still face the challenge of transmitting a number that would be useful to consumers.[499]

The Commission received numerous comments in response to the NPRM's discussion of Caller ID. Some industry representatives simply posited that transmission of Caller ID information was not possible, or argued that it was possible to transmit a telephone number, but that it was impossible or prohibitively expensive to transmit a telephone number that consumers could use to call the telemarketer that had called them.[500] Consumer groups and law enforcement representtatives urged the Commission not to accept telemarketers' claims that mandatory Caller ID transmission is impossible or prohibitively expensive without carefully examining the technical considerations involved.[501] A number of consumers expressed frustration with telemarketers who fail to transmit Caller ID information.[502]

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[498] *Id.*

[499] *Id.* Some telemarketers asserted that the telephone number that would likely be displayed on consumers' Caller ID services would be the telemarketer's central switchboard or trunk exchange, rather than a customer service number or a number where consumers could submit a "do not call" request.

[500] ANA-NPRM at 6; Associations-NPRM at 3; DMA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 25; Synergy Solutions-NPRM at 3-4; Teledirect-NPRM at 3; Associations-Supp. at 7. *See* also AFSA-NPRM at 19; Assurant-NPRM at 6. But *see* EPIC-NPRM at 11, 13; NAAG-NPRM at 45.

[501] EPIC-NPRM at 11-12; NAAG-NPRM at 45; AARP-NPRM at 5-6.

[502] *See, e.g.*, Robert Hawrylak (Msg. 3382); Carl Wallander (Msg. 861); George Kapnas (Msg. 2243); Tom Kaufmann (Msg. 2433); Bob Schmitt (Msg. 3494); Bradley Davis (Msg. 3890); Toryface (Msg. 19744). In all, more than 200 consumers stated that the Commission's proposed

Industry commenters generally supported the proposed prohibition on blocking Caller ID, but urged the Commission not to require Caller ID transmission,[503] although one telemarketer very strongly advocated that the Commission do so in order to remove the cloak of anonymity from telemarketers and thus promote accountability for the greater benefit of the industry as a whole.[504] A number of industry commenters wanted to make sure that "the prohibited practice is the deliberate manipulation of the Caller-ID signal" and that "[a]s long as no overt actions are taken to disrupt the information, there is no violation."[505] Several commenters expressly urged that purchasing or using telephone equipment that lacks Caller ID functionality should not be a violation of the Rule.[506]

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approach in the NPRM was not adequate to protect consumers' right to privacy.

[503] ABA-NPRM at 9; ARDA-NPRM at 6; ANA-NPRM at 6; Associations-NPRM at 3; BofA-NPRM at 7; CBA-NPRM at 10; Comcast-NPRM at 4; DMA-NPRM at 48; ERA-NPRM at 48-49; Green Mountain-NPRM at 27; ITC-NPRM at 3; Lenox-NPRM at 6; MPA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 24-25; Synergy Solutions-NPRM at 3-4; Tribune-NPRM at 10; VISA-NPRM at 13. In the NPRM, the Commission specifically asked, among other things, whether it would "be desirable to propose a date in the future by which all telemarketers would be required to transmit Caller ID information." 67 FR at 4538.

[504] DialAmerica-NPRM at 24; DialAmerica-Supp. at 10; June 2002 Tr. II at 83 (DialAmerica).

[505] Synergy Solutions-NPRM at 3. *See* also Nextel-NPRM at 25; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; ITC-NPRM at 3.

[506] AFSA-NPRM at 19; Comcast-NPRM at 4; CBA-NPRM at 10; Cox-NPRM at 37; Household Bank-NPRM at 16; Nextel-NPRM at 25; Thayer-NPRM at 5; Wells Fargo-NPRM at 3. But *see* EPIC-NPRM at 11, 13-14; McClure-NPRM at 1; Patrick-NPRM at 2-3; Thayer-NPRM at 5 (Commenter raises issue of whether Internet telephony users could transmit Caller ID information. There is nothing in the record indicating

Technical feasibility of mandatory transmission of Caller ID information. The rulemaking record as a whole shows that telemarketers' failure to transmit Caller ID information need not be the result of their blocking its transmission or some other affirmative measure on their part.[507] Rather, the record indicates that non-transmission of Caller ID information may be a by-product of purchasing or using telephone equipment that lacks Caller ID transmission functionality.[508]

In concluding that required transmission of Caller ID information is technically feasible and not costly for telemarketers, the Commission was persuaded in part by the example provided by DialAmerica. In its written comments and at the June 2002 Forum, DialAmerica explained how it transmits Caller ID information to the consumers it calls.[509] DialAmerica's carrier assigns a telephone number to each of DialAmerica's call centers. When a sales representative from

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that telemarketers use Internet telephony. If they do use such technology, they are reminded that all telemarketers subject to the Rule must transmit Caller ID information. The FTC's own telephone system uses IP telephones, which do provide Caller ID information.).

[507] ATA-Supp. at 16-17; Chicago ADM-NPRM at 1; Lenox-NPRM at 6; NRF-NPRM at 19.

[508] EPIC-NPRM at 11; TRA-NPRM at 11. As is discussed below, non-transmission may also result from errors in telephone companies' equipment.

[509] DialAmerica-Supp., Att. A at 1-2. *See* also June 2002 Tr. II at 81-83. According to one of DialAmerica's written comments: "Caller ID information can be delivered over T-1's today. We have been doing it for over two years. If the Commission does not mandate the delivery of Caller ID information, those who would want the Commission to believe that it cannot be done will have been successful." DialAmerica-Supp. at 10. *See* also DialAmerica-NPRM at 25 ("The conclusion stated in the NPRM . . . that trunk or T-1 lines will only display a term like "unavailable" is not correct.") and NAAG-NPRM at 45 ("We have been advised that all trunk lines . . . should be capable of supporting Caller ID.")

a particular call center calls a consumer, that call center's assigned telephone number is transmitted to the consumer's Caller ID service. SBC, a large provider of common carriage services, provided support for the availability of DialAmerica's model.[510] DialAmerica stated at the June 2002 Forum that it does not pay its carrier any extra amount to transmit this assigned telephone number to consumers.[511]

The Commission believes the argument by telemarketers that required transmission of Caller ID information would be impossible or prohibitively expensive is based substantially on an erroneous supposition that telemarketers would be required to transmit the specific telephone number from which a sales representative placed a given call. The Commission's citation to DialAmerica's approach should make it clear that the Commission is not requiring this level of specificity. Under the amended Rule's Caller ID provision, telemarketers may transmit any number associated with the telemarketer that allows the called consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, or a number used by the telemarketer's carrier to bill the telemarketer for a given call. In the alternative, a telemarketer may transmit the seller's customer service number or the charitable organization's donor service number, provided that this number is answered during regular business hours.

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[510] *See* SBC-Supp. at 8-10; June 2002 Tr. II at 80-83. *See* also Cox-NPRM at 37; DMA-NPRM at 49; Green Mountain-NPRM at 28; Associations-Supp. at 7.

[511] June 2002 Tr. II at 83 (DialAmerica). Moreover, other moderate-sized telemarketers reported that they currently transmit Caller ID information. Because they are not compelled to do this, the Commission believes that doing so is not cost-prohibitive. *See* Aegis-NPRM at 5; Lenox-NPRM at 6. *See* also ANA-NPRM at 6; ARDA-NPRM at 6 But *see* ATA-Supp. at 18.

Not every telemarketer will need to follow DialAmerica's approach for transmission of Caller ID information. The record reflects various options in calling equipment used by telemarketers.[512] A telemarketer's choice of calling equipment is determined in part by the telemarketer's size. The smallest telemarketers, most likely placing calls from home, may contact consumers using a "plain old telephone service" ("POTS") line. A telemarketer calling consumers with a POTS line will have no difficulty transmitting Caller ID information.[513] This is also true if, to call consumers, the telemarketer uses Integrated Services Digital Network-Basic Rate Interface ("ISDN-BRI") technology, which, like POTS lines, is likely to be utilized only by the smallest telemarketers.[514]

Larger telemarketers commonly use a "private branch exchange" switch ("PBX"), which enables them to place large volumes of calls more efficiently.[515] For telemarketers

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[512] *See, e.g.*, Nextel-NPRM at 25 (proprietary dialers); DialAmerica-Supp., Att. A at 1 (regular trunk groups provisioned by carrier); Fiber Clean-NPRM at 1 (telemarketers working from home).

[513] SBC-Supp. at 8.

[514] http://www.bell-labs.com/technology/access/ISDN-BRI.html. ISDN -BRI essentially uses a caller's existing wiring to transmit calls digitally. As such, its capability to transmit Caller ID information is akin to a POTS line's capability.

[515] FN515 SBC-Supp. at 8-9. This is also true of telemarketers using predictive dialers. Predictive dialers used by many telemarketers contain features similar to a PBX, and the capacity of such a predictive dialer to transmit Caller ID information is essentially the same as the capacity of a PBX to do so. *See, e.g.*, Sytel-NPRM at 8 (arguing that telemarketers using predictive dialers should transmit Caller ID information. This comment suggests that predictive dialers are capable of transmitting Caller ID information). *See* also http://www.pbxinfo.com/portal/ modules.php? op =modload&name=Sections&file-=index&req=viewarticle&artid=8.

using a PBX, the primary determinant in transmitting Caller ID information is the telemarketer's connection to its telephone company. A telemarketer using a PBX connects to its telephone company through a "trunk."[516] The more modern type of trunk used in telemarketing is an "Integrated Services Digital Network-Primary Rate Interface" ("ISDN-PRI") trunk.[517] It is clear from the record that a telemarketer using such an "ISDN-PRI" trunk has no difficulty in transmitting Caller ID information to a consumer.[518]

The older kind of trunk used in telemarketing is a "T-1" trunk.[519] Telemarketers using a "T-1" trunk are perhaps most likely to follow DialAmerica's model by having their carriers assign a telephone number to the trunk for transmission to consumers' Caller ID services. This is true because, in contrast to "ISDN-PRI" trunks, "T-1" trunks do not routinely transmit the caller's telephone number to Caller ID devices.[520] Some telemarketers stated that it may be technically feasible (but costly) for them to upgrade, reconfigure, or replace their PBX switches or their "T-1"

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[516] SBC-Supp. at 8-9. An alternative to PBX available to telemarketers (but not widely used) is called "Centrex." Telemarketers using Centrex connect to their telephone company using a telephone line; telemarketers using a PBX connect to their telephone company using a trunk. Because Centrex users use a line rather than a trunk, telemarketers using Centrex (like telemarketers using a POTS line or ISDN-BRI) should not find it difficult to transmit Caller ID information. *See* http:// www.granitestatetelephone.com/sfb—centrex.html.

[517] June 2002 Tr. II at 76-77 (SBC).

[518] EPIC-NPRM at 12; SBC-Supp. at 8-9; June 2002 Tr. II at 80-81 (SBC).

[519] Some telemarketers may use a "T3" or "DS3" trunk. This kind of trunk is essentially a collection of "T-1" trunks; as such, it operates in a manner similar to a T-1 for purposes of Caller ID functionality. *See* http://www.hal-pc.org/[tilde]ascend/MaxTNT/hwinst/tntt3.htm.

[520] SBC-Supp. at 8-9.

trunks in order to transmit a specific sales representative's telephone number.[521] However, the Commission's approach does not require this level of precision. Consequently, telemarketers will not have to absorb the expense associated with achievement of this level of precision.

Regardless of telemarketers' calling systems and carriers' ability to assign a telephone number to a telemarketer's call center, there are occasions in which Caller ID information does not reach the called consumer even when telemarketers arrange for the transmission of that information.[522] Two situations would seem to be outside the control of the telemarketer. First, the route traveled by a call could pass through a switch that lacks Caller ID functionality, essentially dropping the Caller ID data but forwarding the rest of the call transmission.[523] Second, a malfunction within a carrier's system could result in the failure to transmit Caller ID information in a given call.[524] Because these phenomena are outside the control of the telemarketer, the telemarketer would not be held liable for violating this provision of the Rule when the failure to transmit Caller ID information results from such an occurrence. However, to avoid liability in such a case, a telemarketer must be able to establish that it has taken all available steps to "transmit or cause the transmission of" identifying information. This includes employing technical means within the telemarketer's operation, ensuring that the telemarketer's telephone company is equipped to transmit Caller ID information, and not using any means to block Caller ID transmission.

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[521] Synergy Solutions-NPRM at 4; TeleDirect-NPRM at 3. But *see* EPIC-NPRM at 11-12.

[522] *See, e.g.*, ABA-NPRM at 9; Chicago ADM-NPRM at 1; IMC-NPRM at 9; Lenox-NPRM at 6; Teledirect-NPRM at 3; Associations-Supp. at 7; ATA-Supp. at 17.

[523] ATA-Supp. at 16; SBC-Supp. at 13.

[524] SBC-Supp. at 13.

A very small number of telemarketers may be located in areas of the country that are served only by telephone companies that are not capable of transmitting Caller ID information or assigning a telephone number to the telemarketer that can be transmitted to a called consumer.[525] The Commission does not intend to require such telemarketers to relocate to areas of the country that are served by telephone companies that do provide Caller ID capability. Nonetheless, in enforcing this provision, the Commission would take into account any telemarketer's relocation from an area where it can transmit Caller ID information to a location where it cannot. However, the Commission believes it is unlikely that a telemarketer would go to such lengths in order to avoid compliance with this new requirement.

The Commission recognizes that transmission of Caller ID information does not depend on technical capability alone. Telemarketers who currently possess Caller ID capability may deliberately decline to transmit this information to the consumers they solicit. There is record evidence to support legitimate explanations for deliberate blocking of Caller ID transmission.[526] Fiber Clean, for example, uses telemarketers working from home; it advocates Caller ID blocking to protect its employees' privacy.[527] Other telemarketers may

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[525] The record reflects that with the exception of some small interexchange carriers ("IXCs"), competitive local exchange carriers ("CLECs"), and some incumbent local exchange carriers ("ILECs") serving rural pockets of the country, all telephone companies can pass along Caller ID information. *See* June 2002 Tr. II at 78-79; FCC First Report and Order in the Matter of Access Charge Reform, CC Docket No. 96-262 (May 7, 1997), para. 137; http:// www.ss7.net: Carriers connected to the Signaling System 7 ("SS7") network can transmit Caller ID information. SS7 is the predominant signaling system, and its use is increasing. But *see* Green Mountain-NPRM at 28.

[526] Fiber Clean-NPRM at 1; Cox-NPRM at 37-38; NRF-NPRM at 19. But *see* ERA-NPRM at 48; Teledirect-NPRM at 3; ATA-Supp. at 16.

[527] Fiber Clean-NPRM at 1.

block Caller ID transmission because they are unable to transmit a telephone number which would be useful to consumers.[528]

The Commission has concluded that some flexibility regarding what telephone number and name the telemarketer may transmit best accommodates the current state of telemarketing.[529] A telemarketing service bureau calling on behalf of more than one seller, for example, may benefit from the option of transmitting the seller's name and telephone number rather than its own.[530] Under § 310.4(a)(7), telemarketers have the option of transmitting a telephone number associated with them that enables the consumer to identify who called, or, in the alternative, the seller's customer service number or the charitable organization's donor service number. If the telemarketer transmits its own number, that number ideally should enable the consumer to communicate with the caller to assert a company-specific "do not call" request. Alternatively, telemarketers can forward consumers' return calls to a customer service line.[531] At-home callers with a POTS line cannot alter, but they can acquire a second line

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[528] Cox-NPRM at 37-38; NRF-NPRM at 19.

[529] ARDA-NPRM at 6; Assurant-NPRM at 6; ATA-Supp. at 16; DMA-NPRM at 50; ERA-NPRM at 49; IMC-NPRM at 8; MPA-NPRM at 9, 49-50. *See also* Assurant-NPRM at 6 (Commenter asked that the Rule do more to prevent transmission of misleading Caller ID information. The Commission believes that the amended Rule addresses this concern.). But *see* AARP-NPRM at 6; NCL-NPRM at 8; Patrick-NPRM at 10 (telemarketer should be required to transmit the seller's name whenever possible). *See also* EPIC-NPRM at 12; Make-A-Wish-NPRM at 5-6; Worsham-NPRM at 4 (telemarketer should identify itself rather than the seller). *See also* BellSouth-NPRM at 4-5 (no flexibility in transmitted number should be permitted).

[530] MPA-NPRM at 9; DMA-NPRM at 50. *See also* Green Mountain at 28; ATA-Supp. at 16.

[531] DialAmerica provides a model for the use of call forwarding in this context. *See* DialAmerica-Supp., Att. A at 2.

for business calls, which would allay privacy concerns associated with transmission of the caller's residential number.

Consumers benefit from transmission of Caller ID information. The record, taken as a whole, establishes that it is neither technically nor economically infeasible for telemarketers to transmit Caller ID information. On the other side of the equation, consumers derive substantial benefit from receiving Caller ID information. Moreover, as the Commission explained in the NPRM, the transmission of Caller ID information is necessary to protect consumers' privacy under the Telemarketing Act.[532] Consumers in large numbers subscribe to, and pay for, Caller ID services offered by their telephone companies.[533] Many of these consumers subscribe to Caller ID specifically to identify incoming calls from telemarketers and screen out unwanted telemarketing calls.[534] Indeed, according to Private Citizen, consumers spend an aggregate of $1.4 billion annually on Caller ID services to limit unwanted telemarketing calls.[535] Consumers who commented on the record expressed frustration at the failure of telemarketers to provide Caller ID information.[536]

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[532] 67 FR at 4514.

[533] Dina ElBoghdady, Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes, WASH. POST, Sept. 8, 2002, at H2 (Noting that, according to a survey conducted in 2000, nearly half of all Americans subscribe to caller ID); ACUTA-NPRM at 2.

[534] McClure-NPRM at 3; Private Citizen-NPRM at 2, Susannah Fox (Msg. 3624), CN Rhodine (Msg. 480), Gautham Achar (Msg. 596), Brenda Hall (Msg. 825), Carl Wallander (Msg. 861). *See also* 67 FR at 4515, n.223 (citing Bell Atlantic survey finding that three out of four residential customers buy Caller ID to help stop abusive telephone calls).

[535] Private Citizen-NPRM at 2. *See* also Associated Press, Phone Companies Act as Double Agents in Telemarketing War, CHI. TRIB., Oct. 27, 2002, at C4.

[536] *See, e.g.*, Robert Hawrylak (Msg. 3382), Patricia Frank (Msg. 223), Jo Ann Kilmer (Msg. 530), Jim Kelly (Msg. 541), Carl Wallander (Msg.

These consumers have, over time, come to the conclusion that an incoming call that fails to provide Caller ID information is commonly a telemarketing call.[537] As a result, some consumers decline to answer these calls.[538] In an attempt to protect their privacy from incoming calls with no Caller ID information provided, other consumers have gone beyond call screening with services such as Caller Intercept and Privacy Manager, both of which are offered by telephone companies for a fee, that intercept incoming calls with no Caller ID information and require such callers to identify themselves before their call will be connected.[539] At present, Caller ID services are an ineffective solution from consumers' perspective: many consumers pay added costs simply to find out who is calling them, yet this investment is useless when the identifying information is not made available.[540]

With the exception of Fiber Clean, which argued in favor of allowing at-home telemarketers to block Caller ID transmission, comments from industry members on the whole did not argue that telemarketers have a reason to block Caller ID transmission which might override the substantial privacy

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861), John G. Talafous (Msg. 1236), Louis Sarvary (Msg. 1319), George M. Kapnas (Msg. 2243), Bob Greene (Msg. 2716). FarmGirl16F3 (Msg. 14015).

[537] *See, e.g.*, Karen Peters (Msg. 3814), Chuck Jackson (Msg. 209).

[538] *See, e.g.*, E Pereira (Msg. 214), Brenda Hall (Msg. 825), Victoria Brigman (Msg. 3889).

[539] FN539 *See, e.g.*, http://www22.verizon.com/ForYourHome /SAS/res—fam—identify.asp; Private Citizen-NPRM at 2; DC-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 2.

[540] AARP-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 3. But *see* Lynn Gaubatz (Msg. 2769) (Consumer prefers current state of affairs where "most" telemarketers block transmission of Caller ID information because her Caller ID is programmed to refuse calls from parties who block such transmission. Using this arrangement, the consumer reports receiving few telemarketing calls.).

protection afforded to consumers when their Caller ID service shows them who is calling.[541] To the contrary, comments from industry members supported the privacy principle behind the Rule's Caller ID provision, but took issue with the proposition that they should be required to transmit or cause transmission of Caller ID information.[542] Therefore, there is strong support for the Commission's position that requiring Caller ID transmission in telemarketing calls will help promote consumers' privacy by allowing them to know who is calling them at home.

Transmission of Caller ID information will also promote accountability throughout the industry—a goal championed by consumers[543] and industry members[544] alike. The Commission is persuaded by the argument DialAmerica presented in favor of requiring transmission of Caller ID in telemarketing calls. According to DialAmerica: "[d]elivery of Caller ID information, that will be displayed on a consumer's Caller ID device or that can be accessed through such services as *69, is essential to create accountability in the outbound telemarketing industry."[545]

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[541] Several comments from industry groups asserted that the Commission should yield to the FCC's standard on Caller ID blocking, under which the calling party's ability to block Caller ID transmission is preserved. *See, e.g.*, DMA-NPRM at 48-49; SBC Supp. at 10-11. As is discussed below, however, the concerns at stake in the FCC's regulation—law enforcement and safety—are not implicated by telemarketing calls.

[542] DMA-NPRM at 48; IMC-NPRM at 8.

[543] *See, e.g.*, Teresa Vargas (Msg. 1292) ("I think telemarketers should NOT be able to block their phone numbers on Caller ID screens or *69. This will make the telemarketers more accountable, particularly if their tactics are in violation of a "do-not-call" request or if, [sic] the telemarketers successfully scam consumers."); Lisa Bellanca (Msg. 2007).

[544] *See, e.g.*, DialAmerica-Supp. at 2; June 2002 Tr. II at 91-92 (ERA).

[545] DialAmerica-Supp. at 2.

Commenters noted that the increase in accountability that would accrue from requiring transmission of Caller ID information in telemarketing would provide particular benefit in addressing abandoned calls.[546] Consumers whose privacy has been abused by dead air and call abandonment find it difficult, if not impossible, to ascribe those practices to a particular telemarketer unless Caller ID information is provided.[547] As explained by DialAmerica, mandatory transmission of Caller ID information will provide "a strong incentive for companies to keep abandonment rates low and eliminate 'dead air,'" as these companies do not want to engage in practices that might encourage consumers to invoke their company-specific "do-not-call" rights.[548]

The enhanced accountability provided by Caller ID transmission extends beyond complaints about call abandonment and dead air. Caller ID information provides a record of identification that endures beyond the telemarketing call. The prompt disclosures required by 310.4(d) provide consumers with a needed introduction to a solicitation call, but do not provide an enduring record of identifying information, as most consumers do not answer the phone with pen and paper at the ready to write down the name of the calling party. Moreover, just as industry comments did not dispute the privacy protections provided by Caller ID transmission, neither did they present a rebuttal to the argument that such transmission will promote accountability in telemarketing. Indeed, the large majority of telemarketers—entities built upon good business practices and compliance with the Rule—will benefit from a provision

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[546] DialAmerica-NPRM at 25; Sytel-NPRM at 8; AARP-NPRM at 9; ARDA-NPRM at 15.

[547] http://www.opc-marketing.com/predictive.htm ("[I]t is assumed that abandoned calls to anonymous consumers do not harm the call center's business.").

[548] DialAmerica-Supp. at 3.

designed to respond to deceptive and abusive practices aided by anonymity in telemarketing.[549]

By eliminating anonymity in telemarketing, the Caller ID provision will serve a third, equally important goal: it will provide law enforcement with a significant new resource.[550] In the years following promulgation of the original Rule, the Commission and the states have created a substantial record of enforcement.[551] However, enforcement efforts concerning some Rule provisions have been frustrated because of difficulty in identifying violators.[552] Sellers and telemarketers that have failed to honor "do-not-call" requests have been particularly hard to identify.[553] A number of comments in the record noted the need for greater ability to identify possible violators, and the advantages of Caller ID information in filling that need.[554] AARP noted that required transmission of Caller ID information will also enable consumers to contact government agencies and the Better Business Bureau to verify the legitimacy of the telemarketer, which will help to prevent fraud before it occurs.[555] Therefore, the transmission of Caller ID information likely will aid law enforcement's ability to enforce the TSR, and increase the Rule's effectiveness.

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[549] *See, e.g.*, AARP-NPRM at 6.

[550] TRA-NPRM at 11; EPIC-NPRM at 11-12.

[551] FTC law enforcement actions alone total over 139 cases, resulting in total judgments of over $200 million since the Rule's inception.

[552] June 2002 Tr. II at 21.

[553] Donald Munson (Msg. 25516); EPIC-NPRM at 11; NYSCPB-NPRM Att. A at 4-5.

[554] DialAmerica-NPRM at 25-26; EPIC-NPRM at 11-12; Patrick-NPRM at 2-3; TRA-NPRM at 11; CN Rhodine (Msg. 480); Charles Goodwin (Msg. 2079); Donald Munson (Msg. 25516).

[555] AARP-NPRM at 6.

Consistency with FCC regulations. FCC regulations require carriers using SS7[556] to provide a mechanism by which a line subscriber can block the display of his or her telephone number on a Caller ID device.[557] SBC referenced the FCC's approach to Caller ID blocking to argue that calling parties' interest in privacy "outweighs the general usefulness of Caller ID service."[558] As the NPRM made clear, the FCC's requirement that common carriers be able to allow Caller ID blocking is meant to address specific calling situations in which protecting the calling party's privacy takes on particular urgency.[559] Cited examples include undercover law enforcement operations and calls placed from battered women's shelters.[560] No such privacy justification suggests itself in the case of telemarketers. Moreover, there is no conflict between the amended Rule's Caller ID provision and FCC regulations. The FTC's provision requires sellers and telemarketers to transmit Caller ID information; it does not create an obligation or a prohibition for common carriers. FCC regulations require certain carriers to provide a mechanism for blocking display of Caller ID information; they do not grant sellers and telemarketers the right to block transmission of that information.

§ 310.4(b)—Pattern of calls

Section 310.4(b)(1) of the original Rule specifies that "[i]t is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in," several practices deemed to be abusive of consumers. The proposed Rule contained

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[556] *See* note 526 above for more on SS7 technology.

[557] 47 CFR 64.1601.

[558] SBC-Supp. at 10-11.

[559] 67 FR at 4515, n.228. *See* also ATA-Supp. at 16; EPIC-NPRM at 14.

[560] *Id.*

some modifications to various subsections of this provision. The responses received in response to the NPRM, and the discussion at the June 2002 Forum, are set forth below.

§ 310.4(b)(1)(i)—Calling repeatedly or continuously

Section 310.4(b)(1)(i) specifies that it is an abusive telemarketing act or practice to cause any telephone to ring, or to engage any person in telephone conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number. None of the comments recommended that changes be made to the current wording of § 310.4(b)(1)(i).[561] Therefore, the language in that provision remains unchanged in the amended Rule.[562] However, the expansion in the scope of the Rule effectuated by the USA PATRIOT Act brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(b)(1)(ii)—Denying or interfering with "do-not-call" rights

In the NPRM, the Commission proposed to prohibit a telemarketer from denying or interfering in any way with a person's right to be placed on a "do-not-call" list, including hanging up the telephone when a consumer initiates a request that he or she be placed on the seller's list of consumers who do not wish to receive calls made by or on behalf of that

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[561] In its comments in the Rule Review, NASAA stated that this provision strikes directly at one of the manipulative techniques used in high-pressure sales to coerce consumers to purchase a product, and noted that the organization advises consumers that one of the "warning signs of trouble" is the "three-call" technique used by fraudulent sellers of securities. NASAA-RR at 2.

[562] Section 310.4(b)(1)(i) of the amended Rule prohibits as an abusive practice "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."

seller.[563] In setting out the proposed prohibition, the Commission noted that during the Rule Review, numerous individual consumers had complained about being hung up on when they asked to be placed on a "do-not-call" list. In other instances, consumers complained that the telemarketer had used other means to hamper or impede these consumers' attempts to be placed on a "do-not-call" list. Participants in both the "Do-Not-Call" Forum and the Rule Review Forum echoed these complaints.[564]

A seller or telemarketer has an affirmative duty under the Rule to accept a "do-not-call" request, and to process that request. Failure to do so by impeding, denying, or otherwise interfering with an attempt to make such a request clearly would defeat the purpose of the "do-not-call" provision, and would frustrate the intent of the Telemarketing Act to curtail telemarketers from undertaking unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer's right to privacy.[565]

Those commenters who addressed this provision strongly supported the prohibition.[566] For example, NAAG stated that an express prohibition against denying or interfering with a consumer's right to be added to a company-specific "do-not-call" list clarifies the seriousness of the telemarketer's obligation to process the consumer's request and will raise confidence in the system.[567]

NAAG noted that the consumer who receives the telemarketing call generally must rely exclusively on the

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[563] 67 FR at 4516.

[564] *Id.*

[565] 15 U.S.C. 6102(a)(3)(A).

[566] *See*, e.g., ARDA-NPRM at 6; Assurant-NPRM at 7; NAAG-NPRM at 44; NCL-NPRM at 8; NYSCPB-NPRM at 5-6; Proctor-NPRM at 4.

[567] NAAG-NPRM at 44. *See* also NCL-NPRM at 8.

telemarketer's truthful disclosure of his or her identity and the nature of the call, and that consumers are often confused because many company names are very similar.[568] In this respect, the Commission's determination to require telemarketers to transmit Caller ID information, discussed above, will provide a valuable tool to both consumers and law enforcement agencies in identifying those telemarketers who fail to comply with their obligation to process the consumer's request.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to deny or interfere in any way with a person's right to be placed on a "do-not-call" list, including hanging up on the individual when he or she initiates such a request. Section 310.4(b)(1)(ii) of the amended Rule prohibits this practice, and encompasses both telemarketers soliciting the purchase of goods or services and those soliciting charitable contributions in accordance with the USA PATRIOT Act amendments.[569] In addition, § 310.4(b)(1)(ii) prohibits anyone from directing another person to deny or interfere with a person's right to be placed on a "do-not-call" list. This aspect of the provision is intended to ensure that sellers who use third-party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a "rogue" telemarketer where there is evidence that the seller caused the telemarketer to deny or defeat "do-not-call" requests.[570]

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[568] NAAG-NPRM at 44.

[569] Moreover, the Rule Review yielded evidence that, in some instances, telemarketers soliciting charitable contributions are unwilling to honor donors' "do-not-call" requests, even when threatened with withdrawal of future support. *See* Peters-RR at 1.

[570] Because the USA PATRIOT Act amendments do not give the Commission jurisdiction over non-profit organizations, the prohibition against causing a telemarketer to deny or defeat "do-not-call" requests

§ 310.4(b)(1)(iii)—"Do-not-call"

The original Rule prohibited a seller or telemarketer from calling a person who had previously asked not to be called by or on behalf of the seller whose goods or services were offered.[571] The proposed Rule added a second "do-not-call" provision that would prohibit a seller or telemarketer from calling a consumer who had placed his or her name and/or telephone number on a centralized registry maintained by the Commission, unless the consumer had provided express authorization for the seller to call him or her.[572] To effectuate the USA PATRIOT Act amendments, the Commission also proposed that for-profit telemarketers who solicit charitable donations be subject to the proposed national registry.[573]

The national "do-not-call" registry proposal generated extensive comment.[574] Consumer and privacy advocates, as well as individual consumers, overwhelmingly supported the creation of such a registry.[575] Indeed, many recommended

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applies only to sellers of goods or services, not to non-profit organizations.

[571] 16 CFR 310.4(b)(1)(ii). This is termed a "company-specific" approach to eliminating unwanted telephone solicitations.

[572] Proposed Rule §§ 310.4(b)(1)(iii)(B) and 310.4(b)(1)(iii)(B)(1) and (2).

[573] 67 FR at 4516, 4519.

[574] As discussed above, the Commission received about 64,000 written and electronic comments in response to the NPRM, including over 45 supplemental comments from organizations and individuals and almost 15,000 comments from Gottschalks' customers that were submitted by Gottschalks as its supplemental comment. The vast majority of comments touched, at least in part, on the proposed national "do-not-call" registry.

[575] *See, e.g.*, DOJ-NPRM at 4 - 5; EPIC-NPRM at 2 - 3; LSAP-NPRM at 12; NAAG-NPRM at 4, 6, 12, 29; NACAA-NPRM at 2; NCLC-NPRM at 13; NCL-[NPRM at 8; NFPPA-NPRM at 1; Pelland-NPRM passim; Proctor-NPRM passim; PRC-NPRM at 2; Private Citizen-NPRM at 1; TDI-NPRM at 4 - 5; Worsham-NPRM at 1. Of the approximately 49,000

that the Commission take a more restrictive "opt-in" approach, and prohibit telemarketing except to those consumers who expressly agree in advance to accept sales calls.[576] State regulators also supported a national registry, provided it did not preempt the "do-not-call" legislation already passed in many states or preclude the states from enforcing these laws.[577]

A number of industry commenters supported the general concept of a national "do-not-call" registry that would preempt state "do-not-call" laws, provided an exemption for "existing business relationships" were added to the Rule. The need for an established business relationship exemption was the most emphatic and consistent theme of industry comments, but other points were raised as well. Some questioned whether the Commission had the statutory authority to establish such a registry.[578] Others argued that a national "do-not-call" registry would impose an unconstitutional restriction on commercial speech.[579] Still others felt that an FTC registry was not necessary because the current system was sufficient

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comments, about 33,000 supported the creation of a national registry, while about 13,700 opposed it. Of the 14,700 comments from Gottschalks" customers, almost 11,500 supported the creation of a "do-not-call" registry, while only about 1800 opposed the idea of a registry.

[576] *See, e.g.*, EPIC-NPRM at 4; NCL-NPRM at 8.

[577] *See, e.g.*, Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2. *See* also AARP-NPRM at 1; NCL-NPRM at 9-10; NCLC-NPRM at 13; PRC-NPRM at 4; Private Citizen-NPRM at 2; TDI-NPRM at 4-5.

[578] *See, e.g.*, Discover-NPRM at 2; ERA-NPRM at 26; NRF-NPRM at 2-3; NAA-NPRM at 2; Paramount-NPRM at 1; PMA-NPRM at 6, 24-26.

[579] *See, e.g.*, NAA-NPRM at 2; Paramount-NPRM at 2; PBP-NPRM passim; Redish-NPRM *passim*.

to protect consumer privacy.[580] These commenters supported increased enforcement of existing federal and state "do-not-call" laws. Charitable organizations and the telemarketers who serve them uniformly opposed the national "do-not-call" registry proposal if applicable to charitable solicitations by for-profit telemarketers. They argued that such a registry would violate the First Amendment and that it would have a devastating impact on the level of contributions that non-profit organizations depend upon to fulfill their missions.[581]

Based on the entire record in this proceeding, the Commission has determined to retain the provision in the original Rule that prohibits a seller or telemarketer from calling a consumer who has previously asked not to be called by or on behalf of that seller. The Commission has also determined to supplement that provision by amending the Rule to establish a national "do-not-call" registry. For the reasons set forth herein, the Commission has decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations. Calls on behalf of charitable organizations will be subject to the company-specific "do-not-call" provision. In addition, the Commission has decided to retain the provision that allows consumers who sign up on the national "do-not-call" registry to provide express agreement to specific sellers to call them, but has modified that provision to require that evidence of such agreements be written, not oral. Furthermore, the Commission has decided to supplement that express agreement provision with a narrowly-defined exemption for "established business relationships." The Commission is persuaded that

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[580] *See*, e.g., Craftmatic-NPRM at 3; ERA-NPRM at 5, 28; PMA-NPRM at 6; TeleStar-NPRM at 2; Weber-NPRM at 2.

[581] *See, e.g.*, DMA-NonProfit-NPRM passim; Not-for-Profit Coalition-NPRM passim; Hudson Bay-NPRM passim. *See* also June 2002 Tr. III at 110, 205-10.

these provisions will work in a complementary fashion to effectuate the appropriate balance between protecting consumer privacy and enabling sellers to have access to their existing customers. Of course, even a seller who is exempt from the prohibition against calling a consumer based on the existence of an "established business relationship" with that consumer must honor that consumer's direct request not to be called under the company-specific "do-not-call" provision.

Background. The original Rule's company-specific approach, which prohibited a seller or telemarketer from calling a person who had previously asked not to be called, was intended to prohibit abusive patterns of calls from a seller or telemarketer to a person. During the Rule Review, industry representatives generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry.[582] The vast majority of individual commenters, however, joined by consumer groups and state law enforcement representatives, claimed that the TSR's company-specific "do-not-call" provision is inadequate to prevent the abusive patterns of calls it was intended to prohibit.[583] They cited several problems with the current "do-not-call" scheme as set out in the FTC and FCC regulations:[584] the

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[582] ARDA-RR at 2; ATA-RR at 8-10; Bell Atlantic-RR at 4; DMA-RR at 2; ERA-RR at 6; MPA-RR at 16; NAA-RR at 2; NASAA-RR at 4; PLP-RR at 1. *See also* DNC Tr. at 132-80.

[583] *See* NAAG-RR at 17-19; NCL-RR at 13-14; DNC Tr. at 132-80. See also, e.g., Anderson-RR at 1; Bennett-RR at 1; Card-RR at 1; Conway-RR at 1; Garbin-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 1; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Mitchelp-RR at 1; Nova53-RR at 1; Peters-RR at 1; Rothman-RR at 1; Vanderburg-RR at 1; Ver Steegt-RR at 1; Worsham-RR at 1.

[584] The FCC's "do-not-call" regulations under the TCPA are at 47 CFR 64.1201.

company-specific approach is extremely burdensome to consumers, who must repeat their "do-not-call" request with every telemarketer that calls;[585] consumers' repeated requests to be placed on a "do-not-call" list are ignored;[586] consumers have no way to verify that their names have been taken off of a company's calling list;[587] consumers find tnat using the TCPA's private right of action[588] is very complex and time-consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when;[589] and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.[590]

In addition to the fact that it has proven ineffective, there is another problem that is not even addressed by the company-specific provision. In particular, because a great many telemarketers are now placing huge patterns of unsolicited telemarketing calls,[591] many consumers find even an initial

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[585] Garbin-RR at 1; NAAG-RR at 17; Ver Steeg-RR at 1.

[586] Harper-RR at 1; Heagy-RR at 1; Holloway-RR at 1; Johnson-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Nova53-RR at 1; Nurik-RR at 1; Peters-RR at 1; Rothman-RR at 1; Runnels-RR at 1; Schiber-RR at 1; Schmied-RR at 1; Vanderburg-RR at 1.

[587] McCurdy-RR at 1; Schiber-RR at 1.

[588] The TCPA permits a person who receives more than one telephone call in violation of the FCC's "do-not-call" regulations to bring an action in an appropriate state court to enjoin the practice, to receive money damages, or both. 47 U.S.C. 227(b)(3). The consumer may recover actual monetary loss from the violation or receive $500 in damages for each violation, whichever is greater. *Id.* If the court finds that a company willfully or knowingly violated the FCC's "do-not-call" rules, it can award treble damages. *Id.*

[589] Kelly-RR at 1; NAAG-RR at 17-19; NACAA-RR at 2; NCL-RR at 13-14.

[590] Kelly-RR at 1.

[591] Based on figures provided by the telemarketing industry, a study prepared for CCC [estimates that the annual number of outbound calls that

call from a telemarketer or seller to be abusive and invasive of privacy. Several states responded to the growing consumer frustration with unsolicited telemarketing calls and the ineffectiveness of the company-specific approach by passing legislation to establish statewide "do-not-call" lists. To date, 27 states have passed such legislation, and numerous other states have considered similar bills.[592]

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are answered by a consumer is 16,129,411,765 (i.e., 16 billion calls). James C. Miller, III, Jonathan S. Bowater, Richard S. Higgins, and Robert Budd, "An Economic Assessment of Proposed Amendments to the Telemarketing Sales Rule," June 5, 2002, (hereinafter "Miller Study") at 28, Att. 1. This figure does not include those calls that are abandoned.

[592] DNC Tr. at 16, 137, 157-58. As of August, 2002, 27 states had passed "do-not-call" statutes. Florida established the first state "do-not-call" list in 1987. (Fla. Stat. Ann. § 501.059). Oregon and Alaska followed with "do-not-call" statutes in 1989. Instead of a central registry, these two states opted to require telephone companies to place a black dot in the telephone directory by the names of consumers who do not wish to receive telemarketing calls. (1999 Or. Laws 564; Alaska Stat. Ann. § 45.50.475). In 1999, Oregon replaced its "black dot" law with a "no-call" central registry program. (Or. Rev. Stat. § 464.567). *See* also article regarding Oregon law in 78 BNA Antitrust & Trade Reg. Report 97 (Feb. 4, 2000). After those three states adopted their statutes, there was little activity at the state level for about a decade. Then, in 1999, a new burst of legislation occurred as five more states passed "do-not-call" legislation—Alabama (Ala. Code § 8-19C); Arkansas (Ark. Code Ann. § 4-99-401); Georgia (Ga. Code Ann. § 46-5-27; *see* also rules at Ga. Comp. R. & Regs. 515-14-1); Kentucky (Ky. Rev. Stat. Ann. § 367. 46955(15)); and Tennessee (Tenn. Code Ann. § 65-4-401; see also rules at Tenn. Comp. R. & Regs. Chap. 1220-4-11). During 2000, six more states enacted "do-not-call" statutes—Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Idaho (Idaho Code § 48-1003); Maine (Me. Rev. Stat. § 4690-A); Missouri (Mo. Rev. Stat. § 407.1095); New York (N.Y. General Business Law § 399-z; *see* also rules at NY Comp. R. & Regs. tit. 12 § 4602); and Wyoming (Wyo. Stat. Ann. § 40-12-301). As of August, 2002, another eleven states had joined the ranks—California (S.B. 771, to be codified at Cal. Bus. & Prof. Code § 17590); Colorado (H.B. 1405, to be codified at Colo. Rev. Stat. § 6-1-901); Illinois (S.B. 1830, signed Aug. 9, 2002); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Kansas

The comments received in response to the NPRM show that frustration with unsolicited telemarketing calls continues despite the efforts of the DMA, the states, and the TCPA/TSR company-specific approaches to the problem. Individual commenters overwhelmingly supported the establishment of a national "do-not-call" registry.[593] This was true even of those

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(S.B. 296, to be codified at Kan . Stat. Ann. 2001 Supp. § 50-670, signed May 29, 2002); Louisiana (H.B. 175, to be codified at La. Rev. Stat. 45:844.11); Massachusetts (H.B. 5225, signed Aug. 10, 2002); Minnesota (S.B. 3246, to be codified at Minn. Stat. § 325E.311, signed May 15, 2002); Oklahoma (S.B. 950, to be codified at Okla. Stat. tit. 15 § 775B.1, signed Apr. 15, 2002); Pennsylvania (H.B. 1469, to be codified as amendment to Pa. Cons. Stat. § 2241; Texas (H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001); Vermont (S. 62, Pub. Act 120, to be codified at Vt. Stat. Ann. tit. 9 § 2464a, signed June 5, 2002); and Wisconsin (Section 2435 of 2001 Wisconsin Act 16, 2001 S.B. 55, to be codified at Wis. Stat. 100.52). In addition, numerous states are considering or recently have considered laws that would create state-run "do-not-call" lists, including Arizona, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and West Virginia. *See* Call Compliance table of state "do-not-call" laws and proposed legislation, http://www.callcompliance.com/pages/STATElist.html (accessed July 24, 2002). The "do-not-call" issue has also drawn the attention of federal legislators, who have introduced several bills aimed at addressing consumers' concerns. For example, in the 106th Congress, H.R. 3180 (introduced by Rep. Salmon) would have required telemarketers to tell consumers that they have a right to be placed on either the DMA's "do-not-call" list or on their state's "do-not-call" list. This proposal also would have required all telemarketers to obtain and reconcile the DMA and state "do-not-call" lists with their call lists. Similar legislation was introduced in the 107th Congress by Rep. King (H.R. 232, the "Telemarketing Victim Protection Act"). In addition, on December 20, 2001, Sen. Dodd introduced S. 1881, the "Telemarketing Intrusive Practices Act of 2001," which would require the FTC to establish a national "do-not-call" registry.

[593] The Commission received approximately 64,000 email and written comments. Of those, approximately 44,000 supported the proposed national "do-not-call" registry, while only about 15,000 opposed the

individuals who were already signed up on their state's "do-not-call" registry or on the DMA's TPS.[594] Although many of these individuals stated that they had found their state registry to be effective in reducing the number of unwanted calls, they thought that a national registry would be a beneficial addition to their state registry because, among other things, a central registry would eliminate some of the loopholes in the state laws, thus increasing coverage, and would provide the convenience of a one-stop method of reducing unwanted calls.[595] Similarly, individuals who were signed up on the DMA's TPS list also said that the list had been effective in reducing the number of unwanted calls, yet they felt that a national registry was needed because they were still receiving unwanted calls.[596]

Consumer groups supported the creation of a national "do-not-call" registry,[597] and some privacy advocates urged the

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creation of such a registry. (The remaining 5,000 comments did not address this issue.)

[594] The Commission received approximately 7,500 comments from consumers who live in states that have "do-not-call" statutes. *See*, e.g., Dan Seaman (AL) (Msg. 1127); Shawn Baumgartner (FL) (Msg. 2771); Edwin Rodriguez (CO) (Msg. 4573); Michelle Crouch (GA) (Msg. 4973); and Rona Owen (TX) (Msg. 6247).

[595] *See, e.g.*, Michelle Crouch (GA) (Msg. 4973); Dan Seaman (AL) (Msg. 1127) (state registry has too many exemptions); Clive and Jane Romig (FL) (Msg. 19125) (current remedies are inadequate).

[596] *See, e.g.*, Robert Winters (Msg. 18984) (resurgence of calls after a while); Gregory Stahmer (Feb. 21, Part 6, Msg. 150) (continues to get unwanted calls); Robert Baly (Feb. 27, Part 1, Msg. 551).

[597] AARP-NPRM at 1; CCA-NPRM at 1; ConsumerPrivacy Guide.com-NPRM at 1; EPIC-NPRM at 2-3; LSAP-NPRM at 12-15; NAAG-NPRM at 4; NACAA-NPRM at 2; NARUC-NPRM at 1, 3; NASUCA-NPRM at 2; NCL-NPRM at 8; NCLC-NPRM at 13; PRC-NPRM at 1; Worsham-NPRM at 1. The U.S. Department of Justice also supported the creation of a national "do-not-call" list maintained by the FTC. DOJ-NPRM at 4-5.

Commission to take an even more restrictive "opt-in" approach by banning telemarketing to any consumer who has not expressly agreed to receive telephone solicitations.[598] With certain caveats, state regulators also supported the proposal for a national "do-not-call" registry.[599] Some states that already have a state "do-not-call" list in place indicated that a national list would complement the current regime of state legislation and could be an effective addition to the arsenal of tools available to consumers in reducing unwanted calls.[600] However, states and consumer advocates cautioned that such a system should be implemented in close coordination with the states and should not supplant more restrictive state laws.[601]

Industry commenters generally believed that the current system is working and that a national "do-not-call" registry is unnecessary.[602] They expressed the view that the DMA's Telephone Preference Service ("TPS") is tantamount to a nat-

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[598] *See, e.g.*, EPIC-NPRM at 3; Worsham-NPRM at 5.

[599] *See, e.g.*, CCA-NPRM at 1; Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2.

[600] CCA-NPRM at 1; Connecticut-NPRM at 1; Kansas-NPRM at 1; NAAG-NPRM at 6, 12, 29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2.

[601] Connecticut-NPRM at 1-2, 3; Kansas-NPRM at 1; NAAG-NPRM at 6-13; NACAA-NPRM at 4-5; NCL-NPRM at 9; NYSCPB-NPRM at 2-4, 13-17; Private Citizen-NPRM at 2; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 3-4. *See also* June 2002 Tr. I at 19-40.

[602] *See, e.g.*, ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

ional "do-not-call" registry. In fact, according to their comments, the TPS has greater coverage than the FTC registry would have because it covers certain entities such as common carriers, banks, and charitable organizations beyond FTC jurisdiction.[603] They argued that these gaps in the national registry's coverage due to the FTC's limited jurisdiction would make a national "do-not-call" list more confusing than helpful to consumers.[604] Some industry members suggested that the states are the more appropriate forum for creation of "do-not-call" lists.[605] Some of these commenters argued that, unlike a national list, that must be "one size fits all," states can be more responsive to the needs of their citizens and tailor their lists to those differing needs.[606]

The record in this matter overwhelmingly shows the contrary—as detailed earlier, it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer. The comments also show that con-

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[603] *See, e.g.*, ATA-NPRM at 24-25; DMA-NPRM at 8-11; ERA-NPRM at 27-28; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM [at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

[604] *See, e.g.*, ERA-NPRM at 28, 36; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

[605] *See, e.g.*, ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2. *See* also Tennessee-NPRM at 6-7.

[606] *See, e.g.*, ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NEMA-NPRM at 4; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 3; Teleperformance-NPRM at 2; TRC-NPRM at 2. *See also* Tennessee-NPRM at 6-7.

sumers continue to be angered by and frustrated with the pattern of unsolicited telemarketing calls they receive from the multitude of sellers and telemarketers. A national "do-not-call" registry addresses both types of abuse. It provides a mechanism that a consumer may use to indicate that he or she finds unsolicited telemarketing calls abusive and an invasion of privacy. It will also protect a consumer from repeated abusive calls from a seller or telemarketer. These problems cannot be fully addressed by state lists. While state "do-not-call" lists may be effective in reducing calls for the citizens in those states, about half the states do not have such legislation. A federal list would protect those consumers who are not currently protected. In addition, as EPIC pointed out in its comment, the state "do-not-call" lists vary with regard to exempt entities, with some containing so many exemptions that virtually all telemarketers are exempt.[607] A federal list would provide uniformity with regard to those entities within the FTC's jurisdiction. Finally, although industry touts the state lists as the appropriate approach to "do-not-call," they also challenge the states' authority to regulate interstate calls under the state "do-not-call" laws.[608] The Telemarketing Act grants the states the authority to enforce the TSR in federal court.[609] Therefore, a national "do-not-call" registry maintained by the FTC pursuant to the TSR (and enforceable by the states) would quell any challenges to state "do-not-call" enforcement with respect to interstate telemarketing.

Some industry members would have the FTC forget about a national registry and continue to let consumers use the current national self-regulatory system set up through DMA's

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[607] EPIC-NPRM at 19.

[608] *See, e.g.*, ATA-NPRM at 24.

[609] 15 U.S.C. 6108.

TPS.[610] DMA has provided an important public service by administering the TPS, and the Commission applauds the efforts of the industry to regulate itself. However, the self-regulatory model has two serious shortcomings which limit its use as an effective national "do-not-call" registry: a self-regulatory system is voluntary; and to the extent that sanctions exist for non-compliance, DMA may apply those sanctions only against its members, not non-members.[611] On the other hand, lists established pursuant to the FTC Act and the Telemarketing Act, as well as those established pursuant to state law, have the force of law, and violators are subject to civil penalties. This type of sanction makes it more likely that companies will take their "do-not-call" obligations seriously.

The Commission recognizes that its jurisdictional limitations will impact the effectiveness of a national "do-not-call" registry. However, the Commission notes that while certain specific entities are exempt from coverage, the telemarketing companies that solicit on their behalf are nonetheless covered by the TSR.[612] Moreover, many consumers have signed up for state "do-not-call" lists,[613] all

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[610] *See, e.g.*, ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

[611] DMA has about 5,000 members. DMA-NPRM at 1.

[612] 67 FR at 4497.

[613] For example, Missouri and Indiana each have more than 1 million telephone numbers on their lists; New York's list contains more than 2 million numbers. *See* Missouri No Call Tops 1 Million Three Days Before One-Year Anniversary of Law, Office of Missouri Attorney General, June 28, 2002, http://www.ago.state.mo.us/062802.htm; and David Wessel, On Hold: Gagging the Telemarketers, WALL ST. J., Apr. 11, 2002, at A2. *See* also NAAG-NPRM at 4, n.3.

of which include various exemptions. Consumers in those states have accepted the limitations of the state "do-not-call" lists and have been satisfied at the prospect of at least *reducing* the number of unwanted telephone solicitations that they receive.[614] Indeed, an FTC registry may be more inclusive than some state "do-not-call" lists.[615] The Commission believes that consumer education will minimize consumer confusion over what calls will and will not be allowed under a national "do-not-call" registry.

Industry pointed to the economic importance of outbound telemarketing, which accounted for $274.2 billion in 2001,[616] and warned that a national "do-not-call" registry would have dire economic consequences.[617] In its supplemental comments, DMA submitted a study showing "the face of the telemarketing industry."[618] According to DMA predictions, job losses would impact most seriously on women, minorities, and rural areas—the groups and regions from which most telemarketers are drawn.[619] Individual sellers and

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[614] *See generally* June 2002 Tr. I at 110-21.

[615] *See* EPIC-NPRM at 19 (noting that some state laws are ineffective due to the number of exempted entities).

[616] DMA, "The Faces and Places of Outbound Telemarketing in the United States," (June 2002) ("DMA study") at 1.

[617] *See id. See* also NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

[618] DMA study, *see* note 616 above.

[619] The DMA study indicates that teleservices workers are overwhelmingly female, high-school educated, and African-American or Hispanic. Almost 62 percent of all females working as teleservices agents are working mothers, and 30 percent are part of a welfare-to-work program or were recently on public assistance. DMA study at 2. The study also indicates that outbound telemarketing call centers can be found in every state, often in rural areas or small towns and cities that are economically distressed. *Id.* at 4. *See* also NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if such a registry were to go into effect.[620] Numerous individual telemarketers submitted comments in which they talked about the pride they have in their work and their fear of losing their livelihood.[621]

The Commission recognizes that telemarketing is a legitimate method of selling goods and services. It is important to remember that the "do-not-call" registry will impact only outbound telemarketing, and will have no effect whatsoever on the greater portion of the industry devoted to inbound calls from consumers.[622] The Commission also recognizes the importance of outbound telemarketing to federal, state, and local economies. Telemarketing provides needed jobs to rural areas and small towns that often face high unemployment, and to people who often face difficulties in obtaining other employment, such as individuals moving off of welfare.

Although industry fears the economic impact a national registry might have, ironically, an FTC "do-not-call" registry may actually benefit rather than harm industry. For example,

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[620] *See* NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1; Teleperformance-NPRM at 2; TRC-NPRM at 2-3. However, the Commission notes that these companies offered no analysis to substantiate their claims regarding the impact of the national registry.

[621] *See, e.g.*, Alhafez (Mar. 22, part 1, Msg. 1712); Cameron (Mar. 6, part 1, Msg. 951); Dillon (Mar. 21, part 2, Msg. 162[illegible] *see also, e.g.*, ACI Telecentrics-[Levie (Msg. 19322); InfoCision Man[illegible]ment-Davis (Msg. 23968); HFC-Beneficial-Darst (Msg. 33709); Household-Alioto (Msg. 27876); LTD Direct-Rockwood (Msg. 27601); and TCIM Services Inc.-Davis (Msg. 22871).

[622] In 2001, inbound telemarketing accounted for 55 percent of total teleservice expenditures and was expected to grow to 62 percent by 2004. Winterberry Group, "Industry Map: Teleservice Industry—Multi-Channel Marketing Drives Universal Call Centers" at 9 (Jan. 2001).

the federal framework, with its exemptions, would provide greater consistency of coverage, at least with regard to interstate calls. In addition, industry would benefit because telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls.[623]

Industry emphasized the importance of harmonizing federal and state laws. To the extent that industry members supported creation of a national "do-not-call" list, they conditioned their support on preemption of state laws.[624] These commenters argued that the major, if not only, benefit to industry from a national "do-not-call" registry would be to eliminate the costs of purchasing multiple lists and complying with a patchwork of potentially 50 different state laws.[625] Absent preemption, industry believed that a national registry would only add another layer of bureaucracy and one more list that they must purchase.[626] The June 2002 Forum discussed in depth the interplay between the national "do-not-call" registry and state laws. Participants agreed that the Commission should seek comity with state laws, and that a

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[623] Industry representatives also have indicated that they do not wish to call consumers who do not want to receive telemarketing calls. *See* DNC Tr. at 41, 51, 53-56, 61, 71.

[624] *See, e.g.*, AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4; Community Bankers-Supp. at 4; ARDA-Supp. at 1; ICTA-Supp. at 1. *See* also June 2002 Tr. at 19-40.

[625] *See, e.g.*, AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4.

[626] *Id.*

single list would provide substantial benefits to both industry and consumers.[627]

For example, Dr. James Miller, testifying on behalf of CCC, estimated that if the Commission's "do-not-call" proposal were enacted as proposed, it would cost all firms that sell their products via outbound telemarketing combined a total of $6.6 million to purchase access to the FTC's "do-not-call" registry and to check their calling lists against the "do-not-call" list to ensure that they do not call consumers who have asked not to be called.[628] If companies could comply with both FTC and state regulations by purchasing access to the FTC's list and not calling consumers whose numbers appeared on that list, this would represent the total burden on firms to avoid calling consumers who did not wish to be called. However, Dr. Miller testified that the total cost to comply with the state regulations as well as the FTC requirements, should firms still have to purchase separate lists from each state having its own do-not-call provisions, could approximate $100 million.[629]

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[627] *See* June 2002 Tr. I at 19-40.

[628] *See* June 2002 Tr. I at 209. Dr. Miller's testimony drew from the Miller Study (see note 591 above). As the study explains, the $6.6 million figure assumes that 3,000 firms will pay $1,000 each on average to obtain access to the list and that it will take the average firm approximately two hours of effort at a cost of $50 per hour each time it is necessary to compare the firm's calling list against the "do-not-call" registry. As proposed in the NPRM, firms would have been required to do this comparison 12 times each year so that the average firm would have incurred a total expense of $2,200. Miller Study at 11-12. Because the amended Rule does not require firms to compare their calling lists to the FTC's "do-not-call" registry monthly as did the NPRM proposal, the estimated cost using Dr. Miller's methodology would now be around $4.5 million.

[629] *See* June 2002 Tr. I at 209.

Finally, commenters raised various issues and offered suggestions relating to the implementation of a national "do-not-call" registry. For example, various commenters questioned the accuracy of automatic number identification ("ANI") verification, the length of time a consumer's telephone number should remain on the list, who should be able to sign up for the list, whether the Commission should allow third parties to submit telephone numbers, the type of information that should be collected, and the accuracy of the Commission's cost estimates.[630] These issues are discussed in the section below addressing implementation.

Coverage of the "do-not-call" provisions. A number of commenters asked the Commission to clarify coverage of its "do-not-call" provisions. Some queried whether calls to home businesses would be subject to the "do-not-call" requirements.[631] The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's "do-not-call" requirements.

Some commenters asked whether the "do-not-call" requirements would cover calls to cellular or wireless telephones and pagers. The Commission intends that § 310.4 (b)(1)(iii) apply to any call placed to a consumer, whether to a residential telephone number or to the consumer's cellular telephone or pager. Consumers are increasingly using cellular telephones in place of regular telephone service,[632] which is

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[630] *See, e.g.*, AFSA-NPRM at 4-10; Craftmatic-NPRM at 3; DC-NPRM at 5; DialAmerica-NPRM at 13; Discover-NPRM at 3; EPIC-NPRM at 14; ERA-NPRM at 29-32; HSBC-NPRM at 2; MBA-NPRM at 2; NYSCPB-NPRM at 7-13. *See* also June 2002 Tr. I at 138-271.

[631] *See, e.g.*, IBM-NPRM at 11-12; Pelland-NPRM at 3.

[632] *See* FCC Notice of Proposed Rulemaking and Memorandum Opinion and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278,

borne out by the dramatic increase in cellular phone usage.[633] The Commission believes that it is particularly important to allow consumers an option to reduce unwanted telemarketing calls to cellular telephones or to pagers because some cellular services charge the consumer for incoming calls, thus adding insult to injury when the consumer is charged for the unwanted telemarketing call to the consumer's cellular telephone.[634]

Established business relationship. Industry commenters overwhelmingly opposed as unworkable the Commission's proposal to allow consumers to give their express authorization to companies from which they wished to receive calls. Industry stated that it would be cost prohibitive for them to contact their customers to obtain authorization (although they provided no detailed support for this argument) and that consumer inertia would keep consumers from independently

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CC Docket No. 92-90 (Sept. 18, 2002) (hereinafter "FCC TCPA 2002") at 27, para. 42 (citing a USA Today/CNN/Gallop poll showing that one in five mobile telephone users use their wireless phone as their primary phone, Michelle Kessler, 18 % *See* Cellphones as Their Main Phone, USA TODAY, Feb. 1, 2002). *See also* Wendy Ruenzel, More Cell Phone Users Dispense with Traditional Phone Line, POST CRESCENT, Aug. 6, 2001; Simon Romero, When the Cellphone Is the Home Phone, N.Y. TIMES, Aug. 29, 2002; Joelle Tessler, Small But Growing Number of Cell Phone Users Abandon Land Lines, SAN JOSE MERCURY NEWS, Aug. 15, 2002.

[633] *See* FCC TCPA 2002 at 26-27, para. 42, n.160 (noting that, in the ten-year period between 1991 and 2001, the number of wireless subscribers increased from about 7.5 million to approximately 128 million. From 1993 to 2001, the average minutes of use per subscriber per month increased from 140 minutes to 385 minutes.) (citations omitted).

[634] *See, e.g.*, Andy Vuong, Telemarketers tap cellphone: Complaints on rise as solicitors dial into no-call exemption, DENVER POST, July 30, 2002; Jennifer Bayot, Now, That Ringing Cellphone May Be a Telemarketer's Call, N.Y. TIMES, July 5, 2002.

providing that type of affirmative authorization.[635] They also argued that consumers may not know in advance which companies they want to hear from.[636]

Industry commenters noted that, without an exemption permitting calls to existing customers, companies would be unable to conduct normal servicing of customers' accounts, since such customer service calls frequently are multiple purpose calls that also include attempts to sell additional goods or services to the customer.[637] Additionally, magazines and newspapers would be unable to contact consumers whose subscriptions had expired to offer them a new subscription.[638] Commenters from financial institutions pointed out that, if not permitted to call current customers, they may run afoul of their fiduciary relationship with those customers.[639] Sellers argued that it would be cost prohibitive for them to use direct mail or other means to contact their customers to obtain authorization to call.[640]

Industry commenters also pointed out that, in failing to include an exemption for existing business relationships, the

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[635] *See, e.g.*, AFSA-NPRM at 8; BofA-NPRM at 9; Cox-NPRM at 6; MBA-NPRM at 5.

[636] FN636 *See, e.g.*, DialAmerica-NPRM at 14; Roundtable-NPRM at 4-5.

[637] *See, e.g.*, ACA-NPRM at 2; ARDA-NPRM at 17; Associations-NPRM at 2; Cendant-NPRM at 5; Comcast-NPRM at 2; DMA-NPRM at 34; HSBC-NPRM at 1; MBA-NPRM at 1-2.

[638] *See* NAA-NPRM at 12, June 28-Supp. at 1, and July 31-Supp. at 1; NNA-NPRM at 3.

[639] *See, e.g.*, ABA-NPRM at 10; ABIA-NPRM at 4; AFSA-NPRM at 13-14; AmEx-NPRM at 3; BofA-NPRM at 3; Bank One-NPRM at 4-5; VISA-NPRM at 13; Wells Fargo-NPRM at 4. However, unless such a customer service call includes an inducement to purchase additional goods or services, it would fall outside the definition of "telemarketing" and, therefore, beyond the scope of the Rule's coverage.

[640] *See, e.g.*, Comcast-NPRM at 2; CAP-Supp. at 1-2.

proposed Rule was at odds with the approach taken by the states with regard to "do-not-call" registries. All state "do-not-call" laws, except Indiana's, include such an exemption.[641] State regulators noted that there have been few complaints from consumers about calls from companies with whom they have an existing business relationship.[642] In addition, FCC regulations under the TCPA exempt "established business relationships" from the company-specific "do-not-call" regulations.[643] Individual commenters who expressed an opinion on this issue were divided on whether there should be such an exemption. Analysis of individual consumer comments that touched on this issue indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1080 opposed such an exemption.[644] Further-

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[641] *See, e.g.*, Ark. Code Ann. § 4-99-403(2)(A); Colo. Rev. Stat. § 6-1-903(10)(B)(II); Conn. Gen. Stat. Ann. § 42-288a(a)(9); Fla. Stat. Ann. § 501.059(1)(c); Ga. Code Ann. § 46-5-27(b)(3)(B); Mo. Rev. Stat. § 407.1095(3)(b); and Tenn. Code Ann. § 65-4-401(6)(B)(iii).

[642] *See* June 2002 Tr. I at 118 (New York: "Well, [consumers are not unhappy], and a lot of times they complain, and you could say that's prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad."); June 2002 Tr. I at 118-19 (Missouri: "Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now."); and *see* generally, June 2002 Tr. I at 110-21.

[643] 47 CFR 64.1200(c)(3). The TCPA requires such an exemption. 47 U.S.C. 227(a)(3).

[644] *See, e.g.*, GBELois (Msg. 44) ("If a person is a member, subscriber, current customer, etc., of a company and the company is calling regarding the status of that relationship then the company should not be obligated to

more, over 13,000 of the nearly 15,000 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a "do-not-call" registry to block other calls.

Finally, industry commenters suggested that the Commission's rationale for not including an exemption for "established business relationships" was faulty.[645] In adopting the original Rule, the Commission had expressed the view that such an exemption was inappropriate because it was not workable in the context of fraud.[646] These commenters pointed out that the "do-not-call" registry was driven by privacy concerns, not concerns about fraud. Therefore, they argued, the Commission's stated rationale was inapplicable in the "do-not-call" context.[647] However, these commenters misunderstood the Commission's rationale in not including an exemption for "established business relationship" in the proposed "do-not-call" provision. In fact, the Commission's rationale for not including such an exemption in its proposal was driven not by concerns about fraud, but by the same privacy concerns that those commenters noted. The

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conform to the do not call registry."); Jerry Warnke (Msg. 371) ("Have to be a way to exempt businesses or organizations when they are returning your phone calls or they have a need to call you with an ongoing relationship."). But *see, e.g.*, Karl Engelberger (Msg. 331) ("All pre-existing agreements and relationships should be voided and can, at the line subscribers discretion be re-established."); Don Price (Msg. 483) ("Sometimes pre-existing relationships are those hardest to communicate with regarding the fact that the individual wants to end the relationship with the telemarketer business—once you give or buy something, many telemarketers expect you to continue what you started and make it a monthly habit—even if that was never your intent.").

[645] *See, e.g.*, DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

[646] *See* 60 FR at 43859.

[647] *See, e.g.*, DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

Commission believed that the national registry should contain few exemptions in order to provide consumers with the most comprehensive privacy protection possible.

Because the proposed Rule did not contain any "established business relationship" exemption, it is not surprising that few commenters raised this issue unless they were advocating that such an exemption be added. In response to industry's strong advocacy in favor of an "established business relationship" exemption, however, the June 2002 Forum elicited comment on whether such an exemption would be appropriate. Privacy advocates opposed any exemptions to the registry, stating that exemptions erode the effectiveness of a "do-not-call" registry.[648] These commenters feared that, because of the difficulty in crafting such an exemption narrowly, an "established business relationship" exemption would provide too great a loophole, and would severely hamper the effectiveness of a national "do-not-call" registry.[649] One consumer spoke at the June 2002 Forum about the dangers inherent in such an exemption.[650] AARP noted in its supplemental comments that an exemption appeared to be necessary, but urged that the Commission keep the exemption very narrow and limit it to existing relationships only, as opposed to prior relationships.[651]

Based on the record as a whole, the Commission is persuaded that the benefits of including an exemption for established business relationships outweigh the costs of such an exemption. Therefore, the Commission has decided to provide an exemption for "established business relationships" from the national "do-not-call" registry, as long as the consumer has not asked to be placed on the seller's company-

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[648] *See, e.g.*, EPIC-NPRM at 20-21; NCL-NPRM at 10.

[649] NCL-NPRM at 10.

[650] June 2002 Tr. I at 278-82 (Diana Mey).

[651] AARP-Supp. at 3.

specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. If the consumer continues to do business with the seller after asking not to be called, the consumer *cannot* be deemed to have waived his or her company-specific "do-not-call" request.[652]

The amended Rule limits the "established business relationship" exemption to relationships formed by the consumer's purchase, rental or lease of goods or services from, or financial transaction with, the seller within 18 months of the telephone call or, in the case of inquiries or applications, to three months from the inquiry or application. As indicated in the discussion of the definition of "established business relationship" in § 310.2(n), this time frame is consistent with most state laws that include a time limit.[653] The exemption is terminated by the consumer's request to be placed on the company's "do-not-call" list, which is consistent with the FCC's regulations and those of many of the states.[654] As explained above in the discussion of § 310.2(n), the definition

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[652] *See* June 2002 Tr. I at 278-82 (Consumer recounted that a telemarketer from a retailer telephoned her, notwithstanding the fact that she was on the retailer's "do-not-call" list. When she questioned them about this apparent error, the telemarketer said that she had recently made a purchase at the retailer, which re-created an "established business relationship," which exempted them from complying with her "do-not-call" request.).

[653] *See* discussion of § 310.2(n) and note 135, above.

[654] *See* 47 CFR 64.1200(f)(4), and discussion in FCC TCPA 2002 (*see* note 633 above) at 8765, para. 23, and at 8770, para. 34, n.63. In addition, several state "do-not-call" statutes contain a similar provision in their exemption for "established business relationships" which terminates the exemption if the consumer has asked not to be called. *See, e.g.*, Alaska, California, Colorado, Connecticut, Illinois, Kansas, New York, Oklahoma, Texas, and Wyoming. *See* note 592, above, for citations to each state's "no-call" laws and/or regulations.

of "established business relationship" encompasses those affiliates of the seller that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.

In addition to an exemption for "established business relationships," the Commission has decided to retain the provision that allows sellers to obtain the express agreement of consumers who wish to receive telephone calls from that seller, but has modified the provision to require that such express agreement may be evidenced only by a signed, written agreement. The Commission believes that it is important to limit the established business relationship to those where there is ongoing contact or where the relationship has recently lapsed or terminated. However, the Commission recognizes that consumers may have ongoing relationships with sellers where the contacts may be infrequent. Therefore, the Commission has decided to retain the provision that would allow sellers to obtain the consumer's express agreement to call, regardless of whether there has been contact during the prior 18 months. In order to minimize the potential for abuse, the amended Rule does not permit sellers or telemarketers to obtain the consumer's oral authorization. Rather, the amended Rule requires that the express agreement meet the same standards as written authorization in § 310.3(a)(3)(i)—*i.e.*, that the express agreement be in writing, signed by the consumer—and must also include the telephone number to which the calls may be placed. Because the express agreement requires the consumer's signature, the Rule makes it more difficult for sellers and telemarketers to bury the consent in the fine print of a document where the consumer might not notice it. The Commission intends that the consent be clear and conspicuous. This express agreement is effective as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again

regardless of whether the consumer continues to do business with the seller.

First Amendment and related considerations applicable to "do-not-call" provisions. As noted above, the proposal to include charitable solicitation telemarketing by for-profit telemarketers within the scope of a national "do-not-call" registry requirement drew extensive negative comment from non-profit organizations and their representatives. These commenters advanced a number of criticisms of the proposal based upon the practical effects it would foreseeably produce if adopted. They also argued that the proposal was fatally flawed from the standpoint of First Amendment analysis. Each of the major points made by these commenters is discussed below.

Because of the central role of the telephone and of professional fundraisers in the non-profit arena, non-profit organizations and their representatives uniformly predicted financial disaster for the non-profit sector if such a proposal were adopted.[655] According to DMA-NonProfit, a quarter of all charitable contributions raised in 2001 came from telephone solicitation,[656] and an estimated 60 to 70 percent of that solicitation was performed by professional fundraisers.[657] These commenters feared the detrimental impact of a national

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[655] *See, e.g.*, DMA-NonProfit-NPRM at 16; Not-for-Profit Coalition-NPRM at 7. *See* also Red Cross-NPRM at 3; APTS-NPRM at 2-3; Childhood Leukemia-NPRM at 1; FireCo-NPRM at 1; California FFA-NPRM at 2; Edwardsville FFA-NPRM at 1; HRC-NPRM at 1-2; Leukemia Society-NRPM at 1-2; March of Dimes-NPRM at 1; Michigan Nonprofit-NPRM at 1; Purple Heart-NPRM at 2; NC Zoo-NPRM at 1; NPR-NPRM at 2; AAST-NPRM at 5; FOP-NPRM at 2; Southern Poverty-NPRM at 2.

[656] DMA-NonProfit-NPRM at 2 (citing the Turner Study, *see* note 142 above).

[657] DMA-NonProfit-NPRM at 2. *See* also Not-for-Profit Coalition-NPRM at 6.

"do-not-call" registry on this important element of the non-profit world's financial support system.[658] One commenter opined that the proposed "do-not-call" registry requirement would reduce the potential donor pool by between 40 to 50 percent, and based on sign-up rates in some states, possibly by as much as 70 or 80 percent.[659]

The proposed registry's impact on non-profit organizations' ability to solicit previous donors was of particular concern. According to a number of commenters, it is axiomatic that persons who have already contributed to a non-profit or charitable organization are much more likely to contribute than are persons who have never done so.[660] In this regard, Not-for-Profit Coalition stated that "[c]ompounding the harm is the fact that the registry would apply equally to donors with a long history of supporting bona fide non-profit and charitable organizations as well as new prospective donors. Depriving charities and non-profits of the ability to contact prior supporters will be financially devastating."[661]

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[658] *See, e.g.*, ACE-NPRM at 1; ADA-NPRM at 1; Red Cross-NPRM at 3; Blood Centers-NPRM at 2; Childhood Leukemia-NPRM at 1; LifeShare-NPRM at 1; March of Dimes-NPRM at 2; NPR-NPRM at 4-5; FOP-NPRM at 3, 4; Project Angel Food-NPRM at 1.

[659] Not-for-Profit Coalition-NPRM at 9.

[660] AFP-NPRM at 4 ("For nearly all nonprofit organizations, pre-existing donors and volunteers constitute the source of a majority of all gifts and volunteer time. These individuals are most committed to a cause and best understand the organization. Donors should not lose the opportunity to hear from organizations they supported in the past."); March of Dimes-NPRM at 3 ("The most generous donors and volunteers are [those who have a prior relationship with the Foundation . . . . If the Foundation cannot contact prior donors and volunteers on the basis of a preexisting relationship, then the effectiveness of our fundraising program will be jeopardized." *See also, e.g.*, APTS-NPRM at 2; ADA-NPRM at 1; AAST-NPRM at 3; FireCo-NPRM at 1; NTC-NPRM at 3; Southern Poverty-NPRM at 2; NCLF-NPRM at 1.

[661] Not-for-Profit Coalition-NPRM at 10.

Not-for-Profit Coalition also argued that the effect of the "do-not-call" registry requirement would be to drive non-profit organizations away from efficient use of professional telefunders, and toward inefficient in-house operations.[662] According to commenters, the efficiency benefits of using professional telefunders may be substantial. For example, Hudson Bay stated:

> HBC's phone canvass is mostly for smaller non-profit organizations (and the state chapters of large ones). Instead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee.[663]

Several representatives of non-profit organizations argued that under relevant First Amendment precedent, charitable fundraising is fully protected speech, and that attempts by the government to regulate it are subject to the highest level of scrutiny.[664] These commenters also noted that under the relevant precedents, no distinction between the speech of the non-profit organization and that of the professional telefunder actually making the calls is recognized—both are equally protected. Several criticized the proposal's exemptions for solicitations by "political clubs, committees, or parties" and "constituted religious organizations" as making distinctions

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[662] *Id.* at 18, 19.

[663] Hudson Bay-Goodman-NPRM at 2. *See also, e.g.*, APTS-NPRM at 3; Not-For-Profit Coalition-NPRM at 19.

[664] *See, e.g.*, Hudson Bay-Goodman-NPRM at 4, 5; DMA-NonProfit-NPRM at 7; Not-For-Profit Coalition-NPRM at 15.

based on the type of speech or speaker that are impermissible under the First Amendment.[665]

The Commission believes that, with respect to telemarketing that solicits sales of goods or services, the "do-not-call" registry provisions are consistent with the relevant First Amendment cases. In *Central Hudson Gas & Elec. v. Pub Serv. Comm.* of N.Y., the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity.[666] Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance this interest; and (3) may extend only as far as the interest it serves[667] —that is, there must be "a 'fit' between the legislative ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[668]

With regard to the first of these criteria, protecting the privacy of consumers from unwanted commercial telemarketing calls is a substantial governmental interest.[669]

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[665] *See*, e.g., DMA-NonProfit-NPRM at 5, 6; Not-for-Profit Coalition at 41.

[666] 447 U.S. 557 (1980).

[667] *Id.* at 566.

[668] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

[669] In some instances, the "do-not-call" registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers. Cf. *Metromedia v. San Diego*, 453 U.S. 490, 509 (1981) (holding, inter alia, that San Diego's "twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals.")

"Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom."[670] The "do-not-call" registry is designed to advance the privacy rights of consumers by providing them with an effective, enforceable means to make known to sellers their wishes not to receive solicitation calls. Simply put, sellers or telemarketers soliciting sales may not call persons who have placed themselves on the registry. The registry is also designed to cure the inadequacies as a privacy protection measure that became apparent in the company-specific "do-not-call" provisions included in the original Rule.[671] Thus, the second of Central Hudson's criteria is satisfied. Finally, the national "do-not-call" registry is a mechanism closely and exclusively fitted to the purpose of protecting consumers from unwanted telemarketing calls.

In *Rowan v. Post Office Dept.*, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender.[672] The Court stated:

> We therefore categorically reject the argument that a vendor has a right under the constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain. . . . To hold less would tend to

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[670] *Frisby v. Schultz*, 487 US 474, 485 (1988).

[671] The shortcomings of the company-specific approach are set forth above in the discussion of § 310.4(b)(1)(iii).

[672] 397 U.S. 728 (1969).

> license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.[673]

Under *Rowan*, the First Amendment allows a statutory scheme whereby a person may block a sender's mailings by notifying the Postmaster General, who then will prevent that sender's mailings from being delivered to that person. The Commission believes that the First Amendment similarly raises no impediment to Rule provisions that will enable a person by signing up on a national "do-not-call" registry to block commercial communications via telephone, which are far more intrusive than the communications, at issue in *Rowan*, via printed words and images.[674]

With respect to telemarketing that solicits charitable contributions, the Commission believes that the applicable analyt-

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[673] *Id.*, at 737-38 (internal citations omitted).

[674] While the statute under consideration in Rowan was focused on mailed advertisements of a sexual nature, the Court specifically rejected arguments that it should be read narrowly to cover only "salacious" or "pandering" advertisements—or even all advertisements. Instead, the court upheld the statute interpreted as covering all mailings from the sender, regardless of whether they were advertisements, and regardless of [whether they were sexually provocative. The determinative factor was that the mailings were unwanted. The Commission does not advance a theory, however, that Rowan should be read here to cover any non-commercial communications.

ical framework is more stringent.[675] "[C]haritable solicitations involve a variety of speech interests . . . that are within the protection of the First Amendment and therefore have not been dealt with as purely commercial speech."[676] In considering the more stringent analysis, the Commission notes, preliminarily, that the company-specific "do-not-call" provisions that apply to charitable solicitation telemarketing are content-neutral. "Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[677] The

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[675] Metromedia makes clear that a less exacting standard is applied in analyzing a regulation's constitutionality with respect to commercial speech than in analyzing the same regulation's constitutionality with respect to noncommercial speech. "[I]nsofar as it regulates commercial speech, the San Diego ordinance meets the constitutional requirements of Central Hudson. . . . It does not follow, however, that San Diego's ban on signs carrying noncommercial advertising is also valid . . . . Commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." Metromedia, 453 U.S. at 513. In *Watchtower Bible and Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080 (2002), where the Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a permit before doing so, the Court went out of its way to suggest that the ordinance might have been constitutional if it were limited to commercial speech. *Id.* at 2089. This may be dicta, but it is significant because the Court seems to have approved a distinction between commercial and noncommercial speech—the same distinction drawn in the amended Rule—and to have done so in the same context as the Rule, i.e., solicitation that threatens to invade the privacy of the home.

[676] *Riley v. Nat'l. Fed. of the Blind*, 487 U.S. 781 (1988) (internal quotation marks omitted).

[677] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994). "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." Turner at 642, citing *Clark v. Cmty.* for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[The] principal inquiry in determining content neutrality is whether the government has adopted a

company-specific "do-not-call" provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions, and regardless of what may be expressed in the solicitation calls themselves or the viewpoints of the organizations on whose behalf the solicitation calls are made. Thus, these provisions are content-neutral.[678]

As in the case of commercial speech, the analysis applicable to charitable solicitations also inquires into the nature of the governmental interest that the regulation seeks to advance. The case law indicates that with respect to the higher level of scrutiny applicable to charitable solicitation, privacy protection is a sufficiently strong governmental interest to support a regulation that touches on protected speech.[679] However, the case law also indicates that, in the case of charitable solicitation, greater care must be given to ensuring that the governmental interest is actually advanced by the regulatory remedy, and tailoring the regulation narrowly so as to minimize its impact on First Amendment rights. In *Riley and Schaumburg*, the Court rigorously

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regulation of speech because of disagreement with the message it conveys."). *See also Am. Target Adver. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (200) (applying this principle in the context of solicitation).

[678] Similarly, the "do-not-call" registry provisions are also content-neutral, because they apply equally to all sellers and telemarketers engaged in the solicitation of sales of goods or services, regardless of the content of the calls, or the viewpoints of the telemarketers or the sellers.

[679] "The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the village may seek to safeguard through some form of regulation." Watchtower, 122 S. Ct. 2080 (2002); *Schaumburg v. Citizens for Better Env't.*, 444 U.S. 620, 637 (1980) (protecting the public from fraud, crime, and undue annoyance are indeed substantial).

examined laws that regulated the percentage of charitable contributions raised by a professional fundraiser that could be retained as the fundraiser's fee. The Court struck down the laws because there was, in the Court's view, at best an extremely tenuous correlation between charity fraud and the percentage of funds paid as a professional fundraiser's fee; the laws therefore were unlikely to achieve their intended purposes of preventing fraud and protecting charities. The Court also found that these laws were not tailored narrowly enough to minimize the impact on the charities' First Amendment rights.

By contrast, a very tight nexus exists between the Commission's legitimate interest in protecting consumers' privacy against unwanted telemarketing calls and the company-specific "do-not-call" provisions that apply to telemarketing to solicit charitable contributions. This nexus does not rely on an attenuated theoretical connection between fraud and the percentage of funds raised that a telefunder takes as its fee. Rather, there is a direct correlation between the governmental interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future.

The Commission approaches with extreme care the issue of tailoring "do-not-call" requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. The Commission is concerned that subjecting charitable solicitation telemarketing—along with commercial telemarketing to solicit sales of goods and services—to national "do-not-call" registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable

side-effect resulting from signing up for the registry to stop sales solicitation calls.[680] In the NPRM, the Commission proposed to resolve this problem by including in the Rule a provision enabling consumers who signed up for the "do-not-call" registry nonetheless to choose selectively to receive calls from specific entities from whom they would welcome solicitation calls. This proposed solution met with uniform condemnation from non-profit organizations, who opined that it would be too costly for non-profit organizations to obtain prospective donors' express permission to call, and too difficult for consumers to exercise their right to hear from them.[681] The Commission is persuaded that these objections may be well-founded, and that this, therefore, would not be an adequate approach to narrow tailoring.

Another solution alluded to in a specific question posed in the NPRM might be to bifurcate the registry into separate categories, one for commercial solicitation and another for charitable solicitation, enabling consumers to sign up separately to stop commercial calls while allowing charitable solicitations.[682] At this time, however, the Commission

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[680] Childhood Leukemia-NPRM at 1 ("I firmly believe if this change is implemented, people attempting to avoid calls from those who sell goods and services over the telephone will put themselves out of reach of our organization, thereby threatening our financial foundation. Th victims will be the children because we will no longer have the resources to help them.")

[681] Non-profit organizations also argued that this proposal was tantamount to a constitutionally impermissible requirement for non-profits to seek permission to speak before speaking.

[682] "Should the "do-not-call" registry be structured so that requests not to receive [telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?" Question 5 i, 67 FR at 4539. Few commenters addressed this question, and those who did so expressed only the most general views, without advocating or opposing the concept of bifurcation. *See, e.g.*, NYSCPB-NPRM at 23 ("[T]he technical problems and costs of

believes that such an approach may be impractical because of cost considerations and because of the difficulty for consumers to understand and deal with the complications of such a system. Thus, these factors may render a bifurcated registry an insufficient or excessively cumbersome response to the imperative of narrow tailoring.

After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the "do-not-call" provisions at this time is to exempt from the "do-not-call" registry requirements solicitations to induce charitable contributions via outbound telephone calls,[683] and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific "do-not-call" regime contained in the original Rule.[684]

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implementing such a system might be prohibitive."); NCLC-NPRM at 19; NCL-NPRM at 9; NAAG-NPRM at 20. Only about 100 individual consumer email comments received by the Commission responded to a direct question on the issue included on the Commission's website. A minority of these commenters (about 40 percent) expressed the view that the "do-not-call" registry should not treat calls from charitable fundraisers differently, while about 60 percent expressed the view that it should do so.

[683] "Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule." Section 310.6(a) of the amended Rule.

[684] The comments of many non-profit or charitable organizations indicate that these organizations have a policy of maintaining a "do-not-call" list even though not legally required to do so. Lautman-NPRM at 1 ("[Professional fundraisers] use the Direct Marketing Association's 'do not call' database, in addition to client maintained 'do not call' lists."); HRC-NPRM at 1 ("[W]e have (like most nonprofit organizations) eliminated unwanted calls to our donors by requiring our telemarketing partners to keep a 'do-not-call' list. We also require them to use the Direct Marketing Association's 'do not call' list."); Telefund-NPRM at 1 ("Most non-profit organizations maintain lists of their own donors who prefer to be contacted via the mail. Telefund Inc. also maintains such a database for its clients."). *See also* ADA-NPRM at 1; American Rivers-NPRM at 1;

The Commission believes that the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution.[685] Thus, the Commission rejects the suggestion from numerous non-profit organizations and their representatives that no privacy protection measures are necessary with respect to charitable solicitation telemarketing, and that telefunders should be exempt from even the company-specific "do-not-call" provisions.[686]

The Commission believes that even though the company-specific approach has not been fully adequate to the task of protecting consumers' privacy rights against an onslaught of commercial solicitations, this more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech. The Commission is persuaded by the arguments of Hudson Bay that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific "do-not-

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Angel Food-NPRM at 1; APTS-NPRM at 3; Childhood Leukemia-NPRM at 1; FOP-NPRM at 1; Italian American Police-NPRM at 1; Illinois Police-NPRM at 1; Leukemia Society-NPRM at 2; SO-CN-NPRM at 1; SO-CO-NPRM at 1; National Children's Cancer-NPRM at 1; Southern Poverty-NPRM at 2; Stage Door-NPRM at 1.

[685] One indication of this is that, even though the FTC web page advising consumers on how to comment specifically included a direct question calling attention to the possibility of a separate database for charitable fundraisers, only about 100 consumer email comments responded to it. A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.

[686] *See generally* Not-For-Profit Coalition-NPRM; DMA-Non-Profit-NPRM.

call" requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising:

> When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.
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> In a non-commercial call the recipient is more than a potential source of income. Rather he or she is also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale, there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the recipient of the call against the cause not just against the caller or their organization.[687]

Nevertheless, if experience indicates that the company-specific approach does not in fact provide adequate protections for consumers' privacy in the context of charitable solicitation telemarketing, the Commission may

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[687] *See also* HRC-NPRM at 1 ("Most importantly, nonprofits are dependent upon the revenue generated by their supporters and will do nearly anything to honor their requests and treat them with the utmost respect.")

revisit this decision in the future, and reconsider whether to require telemarketing calls soliciting charitable donations to comply with the national "do-not-call" registry requirements.

FTC authority to establish a "do-not-call" registry. Several industry members questioned whether the FTC had the statutory authority to establish a national "do-not-call" registry.[688] They argued that the Telemarketing Act does not mention the creation of a "do-not-call" registry and that, in fact, another statute (TCPA) had directed another agency (the FCC) to explore the possibility of establishing such a registry.[689] They noted that the FCC had considered such a registry and rejected it in 1992 in favor of a company-specific approach that required consumers to tell those companies from which they did not wish to receive calls to place them on the company's "do-not-call" list.[690]

Congress passed the Telemarketing Act three years after the FCC rejected a national registry. As noted in the NPRM, the Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices *and other abusive telemarketing acts or practices*," and specifically mandates that these rules prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[691] Thus, establishment of the national "do-not-call" registry is squarely within the authority granted by the statute.

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[688] *See, e.g.*, Advanta-NPRM at 2; ATA-NPRM at 6-10, 20-21; DMA-NPRM at 16-22; ERA-NPRM at 26-27; MPA-NPRM at 34-38; PMA-NPRM at 25-26. *See also* ARDA-Supp. at 1; ATA-Supp. at 7.

[689] *See, e.g.*, DMA-NPRM at 16-22; ERA-NPRM at 26; MPA-NPRM at 34-38; PMA-NPRM at 25-26.

[690] FCC Report and Order, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8762-67 (Oct. 16, 1992).

[691] 15 U.S.C. 6102 (a)(1) and (a)(3)(A) (emphasis added).

The goal in both the TCPA and § 6102(a)(3) of the Telemarketing Act is to protect consumer privacy. When Congress directed the FTC to include in the TSR a prohibition against a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, Congress knowingly put the FTC on the same path that the FCC had trod three years earlier, but did not mandate that the two agencies arrive at the identical conclusion. Instead, the Telemarketing Act is written broadly and does not limit how the Commission is to effectuate the Congressional mandate; it leaves the method of achieving the goal of protecting privacy to the Commission's discretion.[692] There is nothing in the TCPA that would lead to the conclusion that the FCC was the only federal agency authorized to create a national registry. In fact, although Congress had passed the TCPA only three years earlier, it mandated in the Telemarketing Act that the FTC promulgate provisions similar to those that the FCC had promulgated pursuant to TCPA. For example, although FCC regulations already restricted the times that telemarketers can call consumers,[693] Section 6102(a)(3)(B) of the Telemarketing Act directed the FTC to also include in its regulations a provision that would prohibit telemarketers from making unsolicited phone calls to consumers during certain hours of the day or night. Thus, Congress clearly intended to provide the FTC with sufficient authority to remedy the problem of

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[692] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3rd ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

[693] 47 CFR 64.1200(e)(1). *See also* discussion at 7 FCC Rcd at 8767-68.

unwanted telemarketing calls by means of a national registry, notwithstanding that the FCC had earlier decided not to exercise its own authority to do so.

Interplay between the national "do-not-call" registry and state "do-not-call" laws. The NPRM specifically requested comment on how the proposed establishment of a national "do-not-call" registry should interplay with similar requirements on the state level.[694] In response, NAAG and representatives of individual states with "do-not-call" laws expressed concern about the possible preemptive effect of a national "do-not-call" registry.[695] On the other hand, industry representatives urged that if, despite their opposition, the Commission adopted TSR provisions establishing a national "do-not-call" registry, the national registry must preempt similar state requirements.[696]

At this time, the Commission does not intend the Rule provisions establishing a national "do-not-call" registry to preempt state "do-not-call" laws. Rather, the Commission's intent is to work with those states that have enacted "do-not-call" registry laws, as well as with the FCC, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to one harmonized "do-not-call" registry system and a single set of compliance obligations.[697] The Commission is actively

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[694] 67 FR at 4539.

[695] *See, e.g.*, NAAG-NPRM at 6-14; Connecticut-NPRM at 3; DC-NPRM at 4-5 (District of Columbia); NYSCPB-NPRM at 13-17 (New York); Texas PUC-NPRM at 3-4.

[696] *See, e.g.*, ATA-NPRM at 28-29; DMA-NPRM at 3, 14; ERA-NPRM at 34.

[697] In this regard, the Commission notes that in September 2002, the FCC published an NPRM to review its TCPA regulations, including, among other things, whether its company-specific "do-not-call" requirement has been effective and whether a national registry would better serve the public interest. *See* FCC TCPA 2002.

consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business. The Commission's goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls they do not contravene those consumers' requests. In adopting the "do-not-call" provisions in the amended Rule, the Commission intends to advance that goal. At this time, the Commission specifically reserves further action on the issue of preemption until sufficient time has passed to enable it to assess the success of the approach outlined above.[698]

Implementation of a National Do-Not-Call Registry

In developing an implementation plan for a national "do-not-call" registry, the Commission has been guided by a number of concerns. Most importantly, the Commission has sought to ensure the accuracy and validity of the consumer telephone numbers added to the registry, and to build a system that can handle the potential volume of consumer requests to be placed on the registry.[699] Equally important, the

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[698] *See generally English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (preemption can occur "where it is impossible for a private party to comply with both state and federal requirements, *see, e. g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)."); *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); Ass'n of Banks in *Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (where state and federal laws are inconsistent, state law can be pre-empted even if it was enacted to protect its citizens or consumers).

[699] Consumer interest in state "do-not-call" registries has varied from a few percent to over 40 percent of all telephone lines within the state.

system must ensure the security of the information maintained in the registry. The registry also must be easily accessible to both telemarketers and appropriate law enforcement agencies. In addition, the Commission seeks to develop the system with the lowest possible costs.

The Commission conducted extensive research to determine the feasibility of a national "do-not-call" registry and to develop a plan for implementing such a registry. The NPRM asked for comment on a number of specific implementation questions.[700] The staff contacted the states with their own registries, and also contacted many of the contractors used by those states to develop their registries. On February 28, 2002, as part of its research, the Commission issued a Request for Information ("RFI") to contractors capable of assisting the FTC in the development, deployment, and operation of the national registry.[701] Thirty-six different companies responded to the RFI. In August 2002, the Commission issued a Request for Quotes ("RFQ") to selected vendors.[702] A number of those vendors have submitted proposals and quotes to the Commission; the agency is currently evaluating those proposals.[703]

Based on all of the information gathered during this process, the Commission plans to develop a national registry with three components: consumer registration; access to the consumer registration database by telemarketers and sellers; and law enforcement access to both the consumer registration

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[700] 67 FR at 4538-39.

[701] *See* http://www.ftc.gov/procurement.

[702] The Commission issued the RFQ to those vendors that expressed an interest in developing the national registry and that were on General Service Administration ("GSA") schedules to provide goods or services to the federal government.

[703] All vendor responses to both the RFI and RFQ contain confidential proprietary business information and therefore cannot be made public.

database and the list of telemarketers and sellers who have accessed the consumer registration database. The entire system will be fully automated to simplify the process and keep costs to a minimum.

Consumer registration. Consumers will be able to add their telephone numbers to the national "do-not-call" registry through two methods: either through a toll-free telephone call or over the Internet. Consumers who choose to register by phone will have to call the registration number from the telephone line that they wish to register. Their calls will be answered by an Interactive Voice Response ("IVR") system. After a brief introductory message, the consumer will be asked to enter on his or her telephone keypad the telephone number from which the consumer is calling. The number entered will be checked against the automatic number information ("ANI") that is transmitted with the call. If the telephone number the consumer enters on the keypad matches the ANI of the line from which the consumer is calling, then the IVR system will inform the consumer that the number is registered and the call will end. If the telephone number does not match, the IVR system will advise the consumer to call back from the telephone the consumer wishes to register. In the small percentage of calls in which ANI is not available, the system will offer other verification options.

Using this process, the Commission will verify, at a minimum, that each consumer is calling from a telephone line assigned the number the consumer is attempting to register. The Commission has determined that this is sufficient verification for the limited purposes involved here—ensuring that a telephone number in the national registry was entered by someone in the household to which that telephone number is assigned. [704] A number of commenters stated that the FTC

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[704] Unlike the Commission's cases challenging the unauthorized billing of goods or services to consumers' telephone numbers based solely on ANI verification, *see, e.g., FTC v. Verity Int'l, Ltd.*, No. 00 Civ. 7422

should prohibit third parties from registering consumers' preferences not to receive telemarketing calls with the national "do-not-call" registry, citing concerns that such third-party registrations could lead to abuse.[705] The Commission agrees that third-party registrations should not be permitted, and believes that the verification procedures to be established for telephone registrations will prevent these potential types of third-party abuse, because the person registering will have to be present physically in the household with which the telephone number being registered is associated.

Other commenters suggested that only the line subscriber or person who is billed for the telephone line be allowed to register that number in the national registry.[706] In fact, one commenter suggested that the FTC should "permit each adult user of the telephone to prevent calls to him or herself, but not to be able to bar all calls to all adults using that telephone."[707] The Commission does not believe this is a realistic approach. Because numerous people in a household often share a common telephone number, the Commission has determined that the decision to be part of the "do-not-call" registry does not rest with the line subscriber (or any

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(LAK) (S.D.N.Y. 2000); *FTC v. American TelNet, Inc.*, No. 99-1587 CIV:KING (S.D. Fla. 1999), the verification process needed to ensure the validity of numbers in the national registry is much less stringent. Here, only the right not to receive unwanted telemarketing calls is being asserted; the line subscriber is not incurring charges for goods and services, possibly purchased by unauthorized third parties, based on ANI information.

[705] *See, e.g.*, DialAmerica-NPRM at 13; Household-NPRM at 13; Texas PUC-NPRM at 2; PMA-NPRM at 29. NAAG also cited recent state cases against companies that have deceptively offered to add consumers' numbers, for a fee, to "do-not-call" lists. *See* NAAG-NPRM at 19, n.47.

[706] *See, e.g.*, DialAmerica-NPRM at 13; Nextel-NPRM at 26.

[707] AFSA-NPRM at 8.

single resident) alone. In such a shared-number situation, the privacy rights of all are affected by unwanted telemarketing calls. Thus, the decision to register the household telephone number in the national registry is a joint decision of all household members. The Commission's telephone Registration system will accept the registration from any member of the household, but will remind consumers that they are registering on behalf of all household members.[708]

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[708] Several commenters supported allowing any household member to register the household telephone number. *See*, e.g., NCL-NPRM at 9 (allow registration requests to be made by the line subscriber, spouse, roommate, care giver, or others with a legitimate interest). One telemarketer that calls on behalf of non-profit organizations opposed this view, commenting that "each person has an individual, separate constitutional right to speak and be in association with other like-minded people, and the groups to which they belong also have the right to contact their members and the public at large. When dealing with fully protected, non-commercial speech, any do-not-call list that keeps track only of numbers, rather than names and numbers, needs some way to be certain that everyone who is lawfully and regularly reached at a telephone number has consented to be cut off from the organizations to which they belong." Hudson Bay-Goodman-NPRM at 13 (emphasis omitted). As an initial matter, non-commercial speech is not covered by the national "do-not-call" provisions of the amended Rule. *See* amended Rule § 310.6(a) (exempting solicitations to induce charitable contributions via outbound telephone calls from § 310.4(b)(1)(iii)(B) of the Rule). Moreover, the Commission has determined that to accomplish its privacy protection objectives, there is no workable alternative to allowing any member of a household to exercise the "do-not-call" rights of the entire household using a shared telephone number. Households in which one member wants to sign up with the national "do-not-call" registry and another does not have the option of subscribing to an additional telephone line that is not on the registry and may therefore receive telemarketing calls, or they can provide express authorization to specific entities to receive telemarketing calls from them, regardless of their national registry status, pursuant to § 310.4(b)(1)(iii)(B)(i) of the amended Rule. The Commission notes that the "do-not-call" provisions will not "cut off" individuals from organizations or sellers because it will not foreclose other means of communication with any member of the household, such as by

Consumers who choose to register via the Internet will go to a website dedicated to the registration process, where they will be asked to enter the telephone number they wish to register. Consumers will be told that they may register only their household or personal telephone number(s). As with the telephone registration system, they will be reminded that if they share a household number with others, they are registering on behalf of all household members. The Commission is considering two possible methods for verifying consumers' information. One possible option is that a consumer will be asked to enter certain address information, such as his or her zip code and the numeric portion of his or her street address, which the system would then check against a national database to ensure that it matches the telephone number provided. The second possible option is that the consumer will be asked to enter his or her email address; the system will send a confirming email to that address, and the consumer will then have to respond to reconfirm his or her registration decision.

The Commission will use one or both of these verification methods for Internet registrations. Such verification processes will enhance the likelihood that individuals will register their own telephone numbers. If the email verification process is used, the Commission will also develop procedures to prevent

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conventional mail, email, or door to door solicitation. The "do-not-call" provisions are strongly analogous to laws requiring solicitors to honor a "no solicitation" sign posted by a homeowner, which the Supreme Court has approved in such cases as Martin v. Struthers, 319 U.S. 141 (1941), involving "a form of regulation . . . which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed." According to the Court, "[t]his or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ." *Id.* at 148.

large numbers of registrations from being confirmed through the same email account. Once again, the Commission has determined that these are sufficient verification procedures for the limited purpose of adding telephone numbers to the national "do-not-call" registry, and should help prevent the potential abuses cited concerning massive third-party registrations.

For both telephone and Internet registrations, the only personal identifying information that will be maintained by the national "do-not-call" registry will be the consumer's telephone number. Based on our discussions with the states, that appears to be the only piece of information that is needed by telemarketers.[709] Moreover, the Commission has determined that it has no need for consumer names or addresses in the registry.[710] Thus, the Commission will not collect that information.

Consumers will be able to verify or cancel their registration status using either the telephone or Internet. The same verification procedures established for the initial registration will apply to these requests as well. Allowing consumers to verify their registration status and to cancel their registrations

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[709] In fact, based on discussions between the states and the Commission staff, it appears that in states where additional information is provided to telemarketers, the states have received requests to strip their lists of all information except the telephone number.

[710] Some commenters stated that the Commission would have to collect consumers" names, addresses and telephone numbers for the national registry to remain accurate. *See*, e.g., NAA-NPRM at 12; Household-NPRM at 13. Another stated that to keep the registry accurate, "the Commission must be prepared to accept a data stream from every local exchange carrier in the country on a daily basis." SBC-NPRM at 11. The Commission has learned that this is not necessarily true. National databases with sufficient accuracy that contain only telephone numbers now exist, permitting the Commission to purge a telephone number from the national registry when that number is disconnected or the party in whose name the number is registered changes.

if they so wish offers yet another method to enhance the accuracy of the national registry.

The Commission has determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected or reassigned. The Commission wishes to minimize the inconvenience to consumers entailed in periodically re-registering their preference not to receive telemarketing calls.[711] However, the Commission is also aware that the length of time registrations remain valid directly affects the overall accuracy of the national registry.[712] A number of

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[711] Consumer inconvenience includes not just their time and effort necessary to register, but also their need to remember when it is time to re-register. Of course, requiring frequent consumer re-registrations also increases the costs of operating the national registry. Several commenters supported allowing registrations to continue indefinitely, until the consumer's phone number is disconnected or he requests that his number be removed. *See*, e.g., New Orleans at 9; NCL at 9. In addition, 14 states with "do-not-call" registries do not specify a renewal period for registrations in their "do-not-call" statutes (Alabama, Alaska, California, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, and Tennessee).

[712] Commenters citing this concern over the accuracy of the national registry reached various conclusions concerning the time period for which registrations remain should remain valid. Some suggested registrations remain valid for only one year. *See* DialAmerica-NPRM at 13; NCTA-NPRM at 16; Nextel-NPRM at 26. Others stated that registrations should remain valid for two years, unless the Commission can ensure greater accuracy through some purging process. *See* NRF-NPRM at 18; PMA-NPRM at 29. Still others suggested that a five-year registration period is sufficient. *See* NAAG-NPRM at 18; Household-NPRM at 13. State registration periods vary from one year to five years, while, as stated in the previous footnote, fourteen states impose no expiration on consumer registrations. Three states require consumers to renew their registration annually (Arkansas, Florida, and Oregon) Two states (Georgia and Wisconsin) have a two-year registration, and two others (Texas and Idaho) have registrations that are good for three years. Six states require

commenters stated that 16 percent of all telephone numbers change each year, and that 20 percent of all Americans move each year.[713] Unless the system includes a process to counteract this effect, numbers in the national registry that have been disconnected and then reassigned to other line subscribers would remain in the registry even though those line subscribers to whom the numbers are reassigned may not object to receiving telemarketing calls. To guard against this possibility, the system will include a procedure to periodically check all telephone numbers in the national registry against national databases, and those telephone numbers that have been disconnected or reassigned will be purged from the registry. This procedure will help maintain the accuracy of the national registry, while limiting the number of times consumers must go through the registration process.[714] The Commission believes that a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to periodically re-register their telephone numbers.

Access to consumer registration information. To comply with the amended Rule's "do-not-call" provisions, telemar-

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consumers to re-register after five years (Connecticut, Illinois, Kansas, Maine, Vermont, and Wyoming).

[713] *See* DMA-NPRM at 12; Nextel-NPRM at 26; Household-NPRM at 13; SBC-NPRM at 11. Of course, not all consumers who move change their telephone numbers. For consumers who keep their existing telephone numbers when they move, no action by either the consumer or the Commission is necessary to maintain the registry's accuracy.

[714] The DMA TPS is operated in a similar manner. TPS registrations remain valid for five years. During that five-year period, the DMA checks the information in the TPS against the U.S. Postal Service's National Change of Address List, purging the telephone numbers of those registered consumers who have moved. DMA-NPRM at 7, 12.

keters and sellers must gain access to the telephone numbers in the national registry so that they can "scrub" their call lists to eliminate the telephone numbers of consumers who have registered a desire not to be called. For the telemarketer and seller access component of the registry, the Commission plans to develop a fully-automated, secure website dedicated to providing this information to telemarketers and sellers. The first time a telemarketer or seller accesses the system, the company will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If a telemarketer is accessing the registry on behalf of a client seller, the telemarketer will also need to identify that client.

The only consumer information telemarketers and sellers will receive from the national registry is the registrants' telephone numbers. Those telephone numbers will be sorted and available by area code. Telemarketers and sellers will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state or region of the country. Of course, telemarketers and sellers will also be able to access the entire national registry, if desired.

When a seller or telemarketer first submits an application to access registry information, the company will be asked to specify the area codes that they want to access.[715] Each company accessing the registry data will be required to pay an annual fee for that access, based on the number of area codes of data the company accesses.[716] Fees will be payable

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[715] They will be able to amend the list of area codes for which they seek data on future visits, provided they pay the appropriate fee for the additional area codes.

[716] On May 29, 2002, the Commission issued a Notice of Proposed Rulemaking to add a new section 310.9 to the Rule, which would establish a "user fee" for telemarketer access to the national do-not-call registry. 67 FR. 37362. After reviewing the comments received in

via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the telemarketer or seller to wait approximately one day for the funds to clear before data access will be provided).

After payment is processed, the telemarketer or seller will be given an account number and permitted access to the appropriate portions of the registry. That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, telemarketers and sellers will be able to download either an entire updated list of numbers from their selected area codes, or a more limited list, consisting only of additions to or deletions from the registry that have occurred since the company's last download. This would limit the amount of data that a company needs to download during each visit. Telemarketers and sellers will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid. As indicated in the discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or a telemarketer to employ a version of the "do-not-call" registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

Law enforcement access to the registry. Any law enforcement agency that has responsibility to enforce either the Rule or any state do-not-call statute or regulation will be permitted to access appropriate information in the national registry. This information will be provided through a secure Internet website, with access obtained through the Commission's existing Consumer Sentinel[reg] system. Law enforcers will be able to query the registry to determine if and when a

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response to that NPRM, the Commission has decided that it will issue a revised NPRM seeking additional comment on the fee issue in the near future. Section 310.8 of the amended Rule has been reserved for the fee section.

particular telephone number was registered by a consumer. They will also be able to query if and when a particular telemarketer or seller accessed the registry, and the information accessed by that telemarketer or seller. Such law enforcement access to data in the national registry is critical to enable state Attorneys General and other appropriate law enforcement officials to gather evidence to support enforcement actions under the Telemarketing and Consumer Fraud and Abuse Prevention Act,[717] and, as discussed below, once harmonization between the national registry and state do-not-call programs has been completed, to support law enforcement action under state law as well.

Harmonization of various do-not-call registries. As discussed above, the Commission is working with the states to develop a single, national "do-not-call" registry. The Commission envisions allowing consumers throughout the United States to register their preference not to receive telemarketing calls in a single transaction with one governmental agency. In addition, the Commission anticipates allowing telemarketers and sellers to access that consumer registration information through one visit to a national website, developed for that purpose.

To further those goals, the Commission will allow all states, and the DMA if it so desires, to download into the national registry—at no cost to the states or the DMA—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls. Telemarketers and sellers will be allowed to access that data through the national registry as the information is received.

It will take some time to achieve these goals completely, however. Some states will be able to transfer their state "do-not-call" registration information, and will cease requiring telemarketers to access the state registries, by the time

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[717] 15 U.S.C. 6101 *et seq.*

telemarketers first gain access to the national registry. For other states, it may take from 12 to 18 months to achieve those results. At least one state, Indiana, may need up to three years before it can become part of the national system. In any event, the Commission will continue to work diligently with the states in an effort to harmonize these different systems.

Implementation time line. As stated above, the Commission has issued an RFQ to vendors to develop and operate a national "do-not-call" registry. The implementation time line for the registry begins on the date the contract is awarded to a vendor in response to that RFQ. The Commission anticipates awarding the contract as soon as the agency receives appropriate authority and funding from Congress to begin building the national registry.

Consumers will be allowed to begin to register their preference not to receive telemarketing calls approximately four months after a contract for the national "do-not-call" registry is awarded. To avoid an unmanageable surge of calls when the national registry is initially opened, the Commission anticipates phasing in registry availability to consumers one geographic region at a time throughout the United States over a period of approximately two months. Telemarketers and sellers will be given access to the telephone numbers in the national registry approximately six months after the contract is awarded. The effective date for the "do-not-call" provisions of the amended Rule will be approximately seven months after the date the contract to develop and implement the system is awarded. Thus, to comply with the amended Rule, telemarketers will need to obtain the list of registered telephone numbers during the sixth month after the contract is awarded, allowing themselves sufficient time to scrub their calling lists before placing outbound telemarketing calls in the seventh month after the date the contract is awarded.

As stated below in the Effective Date section, in the future the Commission will announce the date by which full

compliance with the national "do-not-call" registry provisions of the amended Rule will be required. As noted elsewhere in this document, full compliance with all other provisions of the amended Rule—with the exception of the Caller ID provision (§ 310.4(a)(7))—will be required by the date on which the amended Rule is effective, March 31, 2003. Full compliance with the Caller ID provisions will be required by January 29, 2004.

§ 310.4(b)(1)(iv)—Abandoned calls & § 310.4(b)(4) —Safe harbor for abandoned calls

In the NPRM, the Commission explained that "abandoned calls" violate § 310.4(d) of the original Rule because such calls failed to provide the requisite prompt disclosures.[718] In providing this explanation, the Commission noted that "abandoned calls" include two distinguishable scenarios: "hang up" calls, in which telemarketers hang up on consumers whom they have called without speaking to them; and "dead air" calls, in which there is a prolonged period of silence between the consumer's answering a call and the connection of that call to a sales representative.[719] The record shows that both types of abandoned calls arise from the use of predictive dialers, which promote telemarketers' efficiency by calling multiple consumers for every available sales representative.[720] Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the amount of time representatives spend waiting to reach a prospective customer.[721] An inevitable "side effect"

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[718] 67 FR at 4524.

[719] 67 FR at 4522.

[720] ABA-NPRM at 12; ATA-NPRM at 32; CADM-NPRM at 3; DialAmerica-NPRM at 22; Pelland-NPRM at 2; Sytel-NPRM at 3; Miller Study at 13; http:// www.predictive-dialers.com/home/faq.html.

[721] ATA-NPRM at 31; ERA-NPRM at 41; MPA-NPRM at 31; NAA-NPRM at 14; Private Citizen-NPRM at 3; PMA-NPRM at 30; TeleDirect-NPRM at 2.

of predictive dialers' functionality is that the dialer will reach more consumers than can be connected to available sales representatives.[722] In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available.[723]

According to one consumer organization, the Rule's prohibition on abandoned calls as set forth in the NPRM addresses "one of the most invasive practices of the telemarketing industry."[724] "Hang up" calls and "dead air" frighten consumers,[725] invade their privacy,[726] cause some of them to struggle to answer the phone only to be hung up on,[727] and waste the time and resources of consumers working from home.[728]

The amended Rule prohibits abandoning outbound telephone calls, but constructs a safe harbor allowing telemarketers to continue using predictive dialers in a regulated manner. Under § 310.4(b)(1)(iv), an outbound telephone call is abandoned if, once the call has been answered by a consumer, the telemarketer fails to connect the call to a sales representative within two seconds of the consumer's completed greeting. (As explained herein, "hang up" calls and delays of more than two seconds before connecting the call to a sales representative are prohibited by this section of the Rule.) The Commission's prohibition of abandoned calls is

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[722] June 2002 Tr. I at 211 (CCC); Time-NPRM at 11; ATA-Supp. at 11; Miller Study at 13-14.

[723] NASUCA-NPRM at 12-13; Sytel-NPRM at 4-7; ATA-Supp. at 11; Miller Study at 13-14.

[724] PRC-NPRM at 3.

[725] 67 FR at 4523.

[726] AARP-NPRM at 9.

[727] 67 FR at 4523; Texas PUC-NPRM at 5; Worsham-NPRM at 5.

[728] PRC at 3.

authorized by § 6102(a)(3)(A) of the Telemarketing Act, which directs the Commission to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, and by § 6102(a)(3)(C), which directs the Commission to require telemarketers to promptly and clearly disclose certain material information. Section 6102(a)(3), which directs the Commission to consider recordkeeping requirements in prescribing rules regarding deceptive and abusive telemarketing acts or practices, is the authority for the required recordkeeping related to predictive dialers.

Section 310.4(b)(4), the amended Rule's safe harbor provision, provides that the Commission will refrain from bringing a Rule enforcement action against a seller or telemarketer based on violations of § 310.4(b)(1)(iv) if the seller or telemarketer's conduct meets certain specified standards designed to minimize call abandonment. These standards are: (1) the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by a consumer, measured per day per calling campaign; (2) the seller or telemarketer must allow each telemarketing call placed to ring for at least fifteen seconds or four complete rings before disconnecting an unanswered call; (3) whenever a sales representative is not available to speak with the person answering the call within two seconds of that person's completed greeting, the seller or telemarketer must promptly play a recorded message; and (4) the seller or telemarketer must retain records, in accordance with § 310.5(b)-(d), establishing compliance with § 310.4 (b)(4)(i)-(iii).

Telemarketers voiced strong objection to the NPRM discussion of abandoned calls as violative of § 310.4(d),[729] and argued that this interpretation would in effect ban the use of predictive dialers,[730] causing the loss of efficiency benefits that arise from the use of predictive dialers.[731] The Commission is mindful of the benefits of increased efficiency, but believes that the increased efficiency of predictive dialers must be balanced against the abusive nature of abandoned calls. The abuses of abandoned calls were delineated in the NPRM and elsewhere in the record.[732] As NAAG asserted at the June 2002 Forum, an abandoned call is basically a "prank call."[733] However, the Commission is

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[729] ABA-NPRM at 12; ACA-NPRM at 9; ATA-NPRM at 30; Associations-NPRM at 3; Capital One-NPRM at 6; DialAmerica-NPRM at 24-25; DMA-NPRM at 44; ERA-NPRM at 40-41; Gannett-NPRM at 4; Infocision-NPRM at 6-7; Metris-NPRM at 10; MPA-NPRM at 29-30; NAA-NPRM at 13, 15; Time-NPRM at 11; Tribune-NPRM at 9.

[730] June 2002 Tr. I at 211 (CCC); ABA-NPRM at 12; Advanta-NPRM at 4; Aegis-NPRM at 5; AFSA-NPRM at 16; Capital One-NPRM at 6; Gannett-NPRM at 4; Household Auto-NPRM at 12; ICT-NPRM at 2; PMA-NPRM at 30; PCIC-NPRM at 2; VISA-NPRM at 12; Miller Study at 14. But *see* EPIC-NPRM at 23.

[731] ACA-NPRM at 8-9; ARDA-NPRM at 15; ANA-NPRM at 6; ATA-NPRM at 31; BofA-NPRM at 9; BRI-NPRM at 3; Discover-NPRM at 6; Fleet-NPRM at 6; FPIR-NPRM at 2; Household Auto-NPRM at 11-12; ICT-NPRM at 2; ITC-NPRM at 2-3; KeyCorp-NPRM at 6; Marketlink-NPRM at 3; MPA-NPRM at 8; NAA-NPRM at 14; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; SHARE-NPRM at 4; Synergy Solutions-NPRM at 4; Technion-NPRM at 5; TeleDirect-NPRM at 2; Teleperformance-NPRM at 3; TRC-NPRM at 4; TeleStar-NPRM at 2; Time-NPRM at 10; Allstate-Supp. at 2; Miller Study at 15. *See* also Citigroup-NPRM at 10; IMC-NPRM at 7 (Predictive dialers enhance dialing accuracy); NAA-NPRM at 7 (Predictive dialers help with "do not call" compliance).

[732] 67 FR at 4522-24; AARP-NPRM at 9; NAAG-NPRM at 47; NACAA-NPRM at 10; PRC-NPRM at 3.

[733] June 2002 Tr. II at 27 (NAAG). *See* also NAAG-NPRM at 47; McKenna-Supp. at 2.

persuaded that a total ban on abandoned calls, which would amount to a ban on predictive dialers, would not strike the proper balance between addressing an abusive practice and allowing for the use of a technology that provides substantially reduced costs for telemarketers. At the June 2002 Forum, one telemarketing group posited that consumers who make purchases via the telephone ultimately benefit from these reduced costs in the form of lower prices.[734] Therefore, taking into account the record as a whole, and arguments raised by both sides of this issue, the Commission has determined to prohibit abandoned calls from continuing without regulation, and has created requirements that, in effect, closely govern the use of predictive dialers. Under this approach, consumers will benefit from a substantial reduction in the number of abandoned calls they receive,[735] but telemarketers will not be deprived of a large part of the efficiency benefits that accrue from the use of predictive dialers.[736] The Commission also notes that the amended Rule's establishment of a national "do-not-call" registry should significantly reduce the number of calls received by consumers who place their numbers on the registry, thereby reducing the number of abandoned calls these consumers must contend with as well.

"Abandoned call": Section 310.4(b)(1)(iv) of the amended Rule defines a prohibited abandoned outbound call as one in which the recipient of the call answers the call, and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. This definition of abandoned call covers "dead air" and "hang up" calls, in which the telemarketer hangs up on a called

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[734] June 2002 Tr. I at 212-13 (CCC). But *see* June 2002 Tr. I at 222-23 (EPIC).

[735] AFSA-NPRM at 16; Sytel-NPRM at 7-8.

[736] *See* KeyCorp-NPRM at 6; PCIC-NPRM at 2.

consumer without connecting that consumer to a sales representative. This approach to abandoned calls clarifies several issues raised by telemarketers in the record.

The amended Rule removes any possibility of doubt that a call placed by a telemarketer is an outbound telephone call within the meaning of the Rule, even if the telemarketer hangs up on the called consumer without speaking to him or her, or subjects the called consumer to dead air. The Rule's disclosure requirement is triggered once a recipient of a telemarketing call answers the phone.[737] This approach is consistent with the treatment of this issue in the NPRM.[738] The Commission rejects the argument, advanced by ACA, ATA, DMA, and ERA, that abandoned calls cannot be regulated by the Rule because they are not "outbound telephone calls."[739] If this theory were valid, telemarketers could abuse consumers in a variety of ways without violating the Rule as long as they did not also engage in a sales pitch.

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[737] The safe harbor, which, among other things, directs how long telemarketers must allow a called consumer's telephone to ring before disconnecting the call, addresses telemarketers' practices before the consumer answers the phone.

[738] 67 FR at 4524.

[739] ACA-NPRM at 9-10; ATA-NPRM at 30; DMA-NPRM at 43-44; ERA-NPRM at 40. DMA, ERA, and PMA argued that the FTC lacks authority to regulate telemarketers' use of predictive dialer technology. [*See* DMA-NPRM at 4, 42-48; ERA-NPRM at 38-40; PMA-NPRM at 29-30.] Specifically, DMA, ERA, and PMA argued that the FCC has authority to regulate automatic telephone dialing systems through the TCPA. But nothing in the TCPA limits the authority of the FTC under the Telemarketing Act. The Rule's regulation of abandoned calls falls squarely within the FTC's authority to regulate abusive telemarketing acts or practices under the Telemarketing Act. As the Commission stated in the NPRM, the harm to consumers that arises from abandoned calls is very real and falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. [*See* 67 FR at 4524.] The Commission therefore rejects the argument offered by DMA, ERA, and PMA that it lacks the legal authority to address call abandonment in the TSR.

That interpretation and that result are contrary to the overall purpose and intent of the Telemarketing Act and plainly at odds with the Rule's definition of "outbound telephone call" and with the Rule generally. A telemarketer initiates a telephone call by causing the called consumer's telephone to ring. Abandoning the call after the consumer answers but before the sales representative begins a sales pitch is an abusive telemarketing act or practice. Certainly this is the type of practice that prompted Congress, in the Telemarketing Act, to direct the Commission to prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[740] The record contains ample evidence that consumers find abandoned calls to be coercive or abusive of their privacy rights.[741]

ATA, in its comment and at the June 2002 Forum, requested guidance from the Commission on how "abandoned call" would be defined in the Rule.[742] Accordingly, the Commission has clarified, in § 310.4(b)(1)(iv), that an outbound call is "abandoned" if, once answered by a consumer, it is not connected to a sales representative within two seconds of the consumer's completed greeting (i.e., no more than two seconds of "dead air").[743] As was explained above, this definition of "abandoned call" also includes situations in which the telemarketer hangs up on a consumer who has answered the telemarketer's call without connecting that call to a sales representative.

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[740] 15 U.S.C. 6102(a)(3)(A).

[741] AARP-NPRM at 8-9; EPIC-NPRM at 23; Private Citizen-NPRM at 4; McKenna-Supp. at 2. *See also* Pelland-NPRM at 2.

[742] ATA-NPRM at 34; June 2002 Tr. II at 38 (ATA). *See* also Convergys-NPRM at 6; MPA-NPRM at 32-33.

[743] DialAmerica-NPRM at 19; Sytel, Outbound Focus Issue 16, http://www.outboundfocus.com.

Abandoned call "safe harbor": The abandoned call safe harbor consists of four components, each of which is supported by record evidence. A seller or telemarketer will not be deemed to have violated § 310.4(b)(1)(iv) by abandoning calls, provided that the seller or telemarketer can show that its conduct conforms to the standards specified in this safe harbor.

Under the first subsection of the safe harbor, the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by called consumers. The safe harbor's three percent abandonment rate is measured per day per calling campaign. The "per day per campaign" unit of measurement is consistent with DMA's guidelines addressing its members' use of predictive dialer equipment.[744] Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.

What constitutes an "acceptable" abandonment rate was the subject of substantial comment on the record. A number of telemarketers urged the Commission to alter the position implied in the NPRM that the appropriate standard is a zero percent abandonment rate.[745] Among industry representatives who advanced this argument, ATA took the most extreme

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[744] FN744 *See* http://www.the-dma.org/library/guidelines/dotherightthing.shtml #38. *See also* MBNA-NPRM at 8. But see ATA-NPRM at 35: Commenter advocated a unit of measurement incorporating "a broad period of time" to allow for variances in abandonment rates caused by such factors as the time of day a call is placed; ERA-NPRM at 44; MPA-NPRM at 30, 32; NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 24.

[745] DialAmerica-NPRM at 24; NAA-NPRM at 15; PMA-NPRM at 31.

position, arguing against any regulation of abandonment rates.[746] The Commission rejects this position in light of the record of conduct affiliated with abandoned calls and predictive dialers under the current regulatory scheme.[747] Other industry comments recommended that the Commission set a "reasonable" or "acceptable" abandonment rate above zero percent that would curb abuses while allowing use of predictive dialers to continue.[748] A third group of telemarketers argued that the Commission's abandonment rate should be consistent with DMA's current guideline, which calls for an abandonment rate no higher than five percent.[749] Consumer groups and law enforcement representatives advocated strongly for a zero abandonment rate.[750]

Taking all of these viewpoints into account, the Commission has concluded that neither extreme strikes the right balance on this issue. The Commission believes that a maximum abandonment rate of three percent strikes a reason-

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[746] ATA-NPRM at 33; ATA-Supp. at 14. *See* also TeleDirect-NPRM at 2.

[747] 67 FR at 4522-23. In the present environment, telemarketers have engaged in predictive dialer practices that frighten, disturb, and aggravate consumers. *See*, e.g., June 2002 Tr. II at 17-18 (AARP); June 2002 Tr. II at 21 (NAAG); June 2002 Tr. II at 22 (DialAmerica).

[748] BofA-NPRM at 9; Citigroup-NPRM at 10; ITC-NPRM at 3; KeyCorp-NPRM at 6; MasterCard-NPRM at 13; Time-NPRM at 11.

[749] http://www.the-dma.org/library/guidelines/dotherightthing.shtml #38; ABA-NPRM at 12; AFSA-NPRM at 16; ARDA-NPRM at 16; CBA-NPRM at 10; Citigroup-NPRM at 10; Discover-NPRM at 6; ERA-NPRM at 43; MPA-NPRM at 8, 32-33; June 2002 Tr. II at 24 (ERA). *See* also NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 22-23; MPA-Supp. at 6, 23; NAA-Supp. at 2; Miller Study at 2. But see NASUCA-NPRM at 14; Tribune-NPRM at 9.

[750] EPIC-NPRM at 22-23; NAAG-NPRM at 47; NASUCA-NPRM at 14; NCL-NPRM at 11; PRC-NPRM at 3; Private Citizen-NPRM at 4; June 2002 Tr. I at 220 (Junkbusters). *See also* Horick-NPRM at 1; McKenna-Supp. at 2. But *see* McClure-NPRM at 1.

able balance between curbing a very abusive practice and preserving some of the substantial economic benefits that accrue from the use of predictive dialers. Two telemarketers essentially supported this abandonment rate as being "feasible, realistic" and "fully capable" of being achieved.[751] ATA asserted that the three percent standard would result in "a significant drop in efficiency" among some of its members.[752] Sytel, a leading provider of predictive dialer technology, urged the Commission not to set a rate below three percent to allow for continuing use of predictive dialers.[753] The three percent standard is also consistent with the California Public Utilities Commission's Interim Opinion regarding predictive dialer use and abandoned calls.[754]

The second component of the abandoned call safe harbor addresses "ring time" or "early hang ups." According to Sytel, some telemarketers using predictive dialers may disconnect calls to consumers after allowing the phone to ring for only a very short period of time before hanging up, without giving consumers a reasonable opportunity to answer the phone; these disconnected calls are not considered "abandoned" by predictive dialers.[755] Employing a short "ring time" is yet another way for telemarketers to maximize the

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[751] PCIC-NPRM at 2; Aegis-NPRM at 5. *See also* ARDA-Supp. at 1: "A rate between three and five percent is reasonable."

[752] June 2002 Tr. II at 49 (ATA). *See also* ATA-Supp. at 15; Associations-Supp. at 6-7; ERA-Supp. at 23; MPA-Supp. at 23; NAA June 28-Supp. at 2.

[753] June 2002 Tr. II at 53 (Sytel).

[754] CPUC Interim Opinion, Rulemaking 02-02-020 (June 27, 2002) at 20. The CPUC concluded that, based on comments it had received in its rulemaking process, "most responsible users of predictive dialing equipment are either already at or near a 3 percent error rate or can achieve it with minimum reprogramming effort."

[755] Sytel-NPRM at 4; Sytel, Outbound Focus Issue 16, http:// www.outboundfocus.com.

efficiency of their sales representatives; the predictive dialer calls many more consumers than the telemarketer can handle to minimize the chance that a sales representative will remain idle.[756] This kind of call is abusive of a consumer's right to privacy, as consumers' lives at home are interrupted without any benefit or purpose whatsoever. One runs to the phone only to have it stop ringing before one can pick it up; or answers it only to find no one there. Surprisingly, one commenter, MPA, actually argued in favor of allowing telemarketers to hang up after one ring if no sales representatives were available to handle the call.[757] Sytel recommends that the Commission follow DMA guidelines on predictive dialers, which recommend allowing the phone to ring at least four times or for twelve seconds before disconnecting the call.[758] Sytel stated that the practice of "early hangups" is widespread, and it urged the Commission to set a "ring time" standard that allows consumers a reasonable length of time to answer the phone.[759] The Commission has concluded that a modified version of the DMA guidelines presents a reasonable approach. Under this part of the safe harbor, telemarketers must let the phone ring either four times or for fifteen seconds before disconnecting the call.[760] This ring time standard will give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted

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[756] Private Citizen-NPRM at 3.

[757] June 2002 Tr. II at 25 (MPA).

[758] Sytel-NPRM at 4; http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38.

[759] Sytel-NPRM at 4.

[760] According to Sytel, the 15-second standard has been adopted by the United Kingdom DMA. Outbound Focus Issue 16, http://www.outboundfocus.com.

by ringing phones with no caller present on the other end of the line.

The third component of the abandoned call safe harbor requires telemarketers to play a recorded message whenever a sales representative is not available to speak with a consumer within two seconds of the consumer's completed greeting. The silence that consumers face when the sales representative is unavailable and does not respond after the consumer says, "hello", is "dead air."[761] The recorded message will significantly mitigate the problems associated with "dead air" by identifying the caller responsible for the extended silence.

According to the record amassed in this proceeding, dead air is an unavoidable feature of predictive dialers.[762] Some dead air in telemarketing calls is caused by answering machine detection ("AMD"): consumers are met with silence as the dialer determines whether the call was answered by a person or an answering machine.[763] Dead air also results when the dialer waits for a sales representative to become available to speak with the called consumer.[764] Sytel argued in favor of setting a maximum dead air standard of two seconds.[765] DMA's predictive dialer guidelines also set a two second maximum for dead air.[766] This standard is consistent

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[761] ARDA-NPRM at 15.

[762] Sytel, Outbound Focus Issue 16, http://www.outbound.focus.com; Sytel-NPRM at 4-5. *See also* ATA-NPRM at 34; Cendant-NPRM at 9; DMA-NPRM at 42.

[763] DialAmerica-NPRM at 19-20; Private Citizen-NPRM at 3; Sytel-NPRM at 4-5; Time-NPRM at 10.

[764] ARDA-NPRM at 15; DialAmerica-NPRM at 20-21; Sytel-NPRM at 4.

[765] Sytel-NPRM at 5-6.

[766] *See* http://www.the-dma.org/library/guidelines/dotherightthing.shtml #38. But see ATA-Supp. at 14 (supporting a four-second dead air standard); ERA-Supp. at 25, MPA-Supp. at 23 (Commenters' proposed definition of "abandoned call" has no dead air time limit).

with the recent CPUC Interim Opinion governing predictive dialers.[767] Based on the record established on this issue—that use of predictive dialers inevitably entails some dead air and that two seconds of dead air allows predictive dialers to impart significant efficiencies—the amended Rule provision allows two seconds of dead air before a call answered by a consumer will be considered "abandoned."

Consumers on the receiving end of dead air may wonder if "someone is waiting to get into my home when I'm away, or . . . determining when I'm home alone."[768] The Commission believes it is not so much the pause that frightens consumers, it is the silence. By playing a recorded message giving the name and telephone number of the seller responsible for the call, the fear generated by telemarketers' dead air is substantially mitigated, and telemarketers are able to continue using predictive dialer technology.[769]

The "recorded message" component of the safe harbor must be read in tandem with the prohibition of abandoned calls, under which telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device.[770] The Rule specifies that tele-

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[767] CPUC Interim Opinion at 11-12.

[768] AARP-NPRM at 9.

[769] ARDA-NPRM at 15-16; Household Auto-NPRM at 12; NACAA-NPRM at 10; PCIC-NPRM at 2; TeleDirect-NPRM at 3; Texas PUC-NPRM at 5.

[770] *But see* Kans. Rev. Stat. 50-670(b)(6), which does not distinguish between the two.

marketers must connect calls to a sales representative rather than a recorded message.[771]

The record reflects a range of views regarding the prospect of using recorded messages in telemarketing. A consumer advocacy group, a law enforcement body, and some telemarketers expressed support for recorded messages as a way to mitigate the abuses arising from dead air.[772] Others opposed requiring the use of recorded messages.[773] DMA opposed it based on the assumption that telemarketers' messages would need to include all of the prompt disclosures required by § 310.4(d).[774] DMA noted that recorded messages containing these disclosures could violate the TCPA.[775] Time similarly opposed it based on concern for requiring the recorded message to include the prompt disclosures and, in addition, posited that consumers would not support receiving recorded-message disclosures on their answering machines.[776] The Commission's approach to the recorded message

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[771] This comports with the CPUC Interim Opinion governing predictive dialers, DMA's guidelines for predictive dialers, and Sytel's recommended approach. See CPUC Interim Opinion at 10-12; http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38; Sytel-NPRM at 3.

[772] AARP-NPRM at 9; ARDA-NPRM at 15; BofA-NPRM at 9; CADM-NPRM at 1; Household Auto-NPRM at 12; PCIC-NPRM at 2; Texas PUC-NPRM at 5. *See also* McClure-NPRM at 2. *But see* MasterCard-NPRM at 13.

[773] DMA-NPRM at 44; EPIC-NPRM at 24; Time-NPRM at 11; Worsham-NPRM at 5.

[774] DMA-NPRM at 44. *See also* Capital One-NPRM at 6-7; NASUCA-NPRM at 13-14; NCL-NPRM at 11; Private Citizen-NPRM at 4.

[775] DMA-NPRM at 44. *See also* Sytel-NPRM at 6; Worsham-NPRM at 5.

[776] Time-NPRM at 11. *See also* ANA-NPRM at 6; Associations-NPRM at 3.

component of this safe harbor should allay these concerns.[777] The recorded message need not include all required prompt disclosures; rather, the message need contain no more than the seller's name and telephone number.[778] Of course, it must comply with applicable state and federal laws governing the use of recorded messages, such as the FCC's TCPA regulations. Moreover, telemarketers are not required to leave a recorded message on the answering machines of consumers who are not home to answer the telemarketer's call. In light of the limited nature of the elements of the recorded message component of the safe harbor, the Commission's approach also resolves Sytel's caution against allowing the use of recorded messages without regulation.[779]

The fourth component of the abandoned call safe harbor is a recordkeeping requirement. Specifically, telemarketers using predictive dialers under this safe harbor must keep records documenting compliance with the first three components of this safe harbor in a manner that is in accordance with the recordkeeping requirements of the Rule set out in § 310.5(b)-(d). The record clearly establishes the need for this requirement. According to statements at the June 2002 Forum, some telemarketers routinely exceed DMA's recommended maximum abandonment rate of five percent.[780] At the June 2002 Forum, DMA explained that enforcement of its guideline was difficult despite receiving complaints.[781] The

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[777] Capital One-NPRM at 6-7.

[778] When consumers receive this information, they will not have to wonder whether the call has been placed by someone with sinister motives, as described by AARP. *See* AARP-NPRM at 9; ATA-Supp. at 11.

[779] Sytel-NPRM at 6.

[780] June 2002 Tr. II at 29 (ATA); June 2002 Tr. II at 45 (DialAmerica); June 2002 Tr. II at 52 (Sytel). *See also* Capital One-NPRM at 6; DialAmerica-NPRM at 23; NASUCA-NPRM at 14; Sytel-NPRM at 7.

[781] June 2002 Tr. II at 51 (DMA).

Commission foresees that, absent recordkeeping requirements, the Commission would encounter similar difficulty in enforcing this aspect of the amended Rule. Furthermore, the record does not contain opposition to a recordkeeping requirement associated with the use of predictive dialers, and the records required by the Commission in this provision of the Rule are similar to those supported by industry representatives in the CPUC's predictive dialer rulemaking proceeding.[782] The Commission believes that predictive dialer technology can capture and preserve abandonment rate records as a matter of routine;[783] records showing compliance with the ring time and recorded message requirements will not impose a significant burden on telemarketers who wish to take advantage of this safe harbor.

§ 310.4(b)(2)—Restrictions on use of list

Section 310.4(b)(1)(iv) of the proposed Rule prohibited any seller or telemarketer from selling, purchasing, or using a seller's "do-not-call" list for any purpose other than com plying with the Rule's "do-not-call" provision. The amended Rule retains the provision but modifies the language to also prohibit the sale, purchase, rental, lease, or use of the national registry maintained by the Commission for any purpose other than compliance with the Rule's "do-not-call" provision or otherwise to prevent telephone calls to telephone numbers on either the sellers' lists or the national registry.

Those commenters who addressed this provision supported such a prohibition.[784] NCL stated that, since consumers who sign up for a "do-not-call" list are seeking to preserve their privacy, it would be an invasion of their privacy to use any

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[782] CPUC Interim Opinion at 20-22.

[783] TeleDirect-NPRM at 2.

[784] *See, e.g.*, AARP-NPRM at 3; EPIC-NPRM at 16; NCL-NPRM at 8-9; NYSCPB-NPRM at 6-7; Texas PUC-NPRM at 1-2; Verizon-NPRM at 5. *See also* June 2002 Tr. I at 215-25.

information that would identify those consumers (*e.g.*, names or telephone numbers) for any purpose other than to ensure that those individuals do not receive unsolicited telemarketing calls.[785]

In addition to expanding the provision to cover the sale, purchase, rental, lease, or other use of the registry, the amended Rule has made this prohibition a separate and distinct abusive practice. In the proposed Rule, this provision was part of § 310.4(b)(1), which sets out prohibited practices by telemarketers, including adherence to the "do-not-call" provision. Section 310.4(b)(1) also prohibited sellers from causing telemarketers to engage in the prohibited practices. However, the Commission believes that it is important for all persons, not just sellers and telemarketers, to use the "do-not-call" lists properly. Therefore, the amended Rule retains this provision, renumbered as § 310.4(b)(2), but extends the prohibition to "any person," in order to prohibit all entities, not just sellers and telemarketers, from misusing "do-not-call" lists. By extending the prohibition to "any person," the Commission intends that the provision apply to such parties as list brokers and other entities that do not fall within the definitions of "seller" or "telemarketer." In addition, the amended Rule adds a provision that permits a person to use either seller-specific lists, or the national registry, not only to comply with the "do-not-call" provisions of the Rule, but also "to prevent telephone calls to telephone numbers on such lists." This provision will permit an entity not subject to the amended Rule for whatever reason (e.g., because it is outside of the Commission's jurisdiction) to access the national registry in order to scrub its calling lists, if it wants to avoid calling consumers who have expressed a preference not to receive telemarketing calls.

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[785] NCL-NPRM at 8-9.

§ 310.4(b)(3)—Safe harbor for "do-not-call"

Section 310.4(b)(3) provides sellers and telemarketers with a limited safe harbor from liability for violating the "do-not-call" provision found in § 310.4(b)(1)(iii).[786] During the original rulemaking, the Commission determined that sellers and telemarketers should not be held liable for calling a person who previously asked not to be called if they had made a good faith effort to comply with the Rule's "do-not-call" provision and the call was the result of error. The Rule established four requirements that a seller or telemarketer must meet in order to avail itself of the safe harbor: (1) it must establish and implement written procedures to comply with the "do-not-call" provision; (2) it must train its personnel in those procedures; (3) it must maintain and record lists of persons who may not be contacted; and (4) any subsequent call must be the result of error.

These criteria tracked the FCC's regulations, which set forth the minimum standards that companies must follow to comply with the TCPA's "do-not-call" provision.[787] In the NPRM, the Commission proposed three additional requirements which have to be met by sellers or telemarketers or others acting on behalf of a seller or charitable organization before they may avail themselves of the "safe harbor:" (1) they must use a process to prevent telemarketing calls from being placed to any telephone number included on the Commission's national registry using a version of the registry obtained not more than 30 days before the calls are made; (2) they must maintain and record consumers' express verifiable authorizations to call; and (3) they must monitor and enforce compliance with their "do-not-call" procedures.

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[786] This provision has been renumbered in the amended Rule. In the original Rule and in the NPRM, the "safe harbor" provision is § 310.4(b)(2).

[787] 47 CFR 64.1200(e)(2).

Based on the record in this matter, and for the reasons set forth below, the amended Rule retains the "safe harbor" requirement to monitor and enforce compliance. However, the amended Rule deletes the "safe harbor" provision expressly requiring maintenance and recording of express verifiable authorizations.[788] In addition, § 310.4(b)(3)(iv), the "safe harbor" requirement to purchase and reconcile the registry, has been modified to delete the 30-day requirement and, instead, require that telemarketers employ a version of the registry which has been obtained no more than three months before a call is made, and to maintain records documenting that process.[789]

The Commission continues to believe that the Rule should contain a "safe harbor" from liability for violations of its "do-not-call" provision. Commenters generally agreed with this position.[790] Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their "do-not-call" rights should not be liable for violations that result from error. Further, as discussed in the NPRM, the Commission believes that the same rationale applies to potential violations of § 310.4(b)(1)(ii), and therefore has, in the introductory sentence of § 310.4(b)(5), extended the "safe harbor" to cover violations of *both* amended § § 310.4(b)(1)(ii) and (iii). Section 310.4(b)(1)(ii) prohibits a seller or telemarketer from denying or interfering with a person's right to be placed on a "do-not-call" list, whereas § 310.4(b)(1)(iii) prohibits calling a person who has previously requested to be placed on such a list.

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[788] This requirement was in § 310.4(b)(2)(v) of the proposed Rule.

[789] This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

[790] *See, e.g.*, ARDA-NPRM at 13; BofA-NPRM at 6; NACAA-NPRM at 9; Verizon-NPRM at 4-6. *But see* CATS-NPRM at 2; Patrick-NPRM at 5-6 (cautioning that the standards set forth in the "safe harbor" should be obligatory for all telemarketers subject to the Rule).

Although the Commission has extended the "safe harbor" provision to cover the additional practice of denying or interfering with a consumer's right to be on a "do-not-call" list, it has also tightened the provision by adding the requirement that sellers and telemarketers monitor compliance and take disciplinary action for non-compliance in order to be eligible for the safe harbor. Section § 310.4(b)(5)(v) of the amended Rule requires the seller or telemarketer to monitor and enforce compliance with the procedures established in § 310.4(b)(5)(i).

During the Rule Review, numerous commenters described the problems they had encountered in attempting to assert their "do-not-call" rights and with companies that continued to call after the consumer asked not to be called.[791] Several commenters echoed these complaints in their responses to the NPRM.[792] This anecdotal evidence indicates that some entities may not be enforcing employee compliance with their "do-not-call" policies. In fact, one consumer reported that telemarketers for two different companies told her that it was not necessary that a company's "do-not-call" policy be effective, only that such a policy exist.[793]

To clarify this apparent misconception about the Rule's requirements, the Commission proposed that, in order to avail themselves of the "safe harbor" provision, sellers and telemarketers must be able to demonstrate that, as part of ordi-

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[791] *See, e.g.*, Bennett-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 3; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR, *passim*; Nova53-RR at 1; Peters-RR at 1; Runnels-RR at 1.

[792] *See, e.g.*, Synergy Global-NPRM at 1-2 (ex-telemarketer says firm ignored "do-not-call" lists); Denny (Feb. 21, Msg. 970); Connolly (Mar. 6, Msg. 961); Young (Feb. 27, Msg. 165); Jackson (Feb. 2, Msg. 521); Horowitz (Feb. 27, Msg. 598); Truitt (Feb. 28, Msg. 687); Griffin (Feb. 28, Msg. 708); Loeher (Feb. 28, Msg. 729).

[793] Mey-RR at 2. *See also* DC-NPRM at 6-7.

nary business practice, they monitor and enforce compliance with the written procedures required by § 310.4(b)(5)(i). The Commission received few comments on this proposal, and those commenters supported the proposal.[794] Therefore, the Commission retains § 310.4(b)(5)(v) unchanged, except for renumbering. It is not enough that a seller or telemarketer has written procedures in place; the company must be able to show that those procedures have been and are implemented in the regular course of business. Thus, a seller or telemarketer cannot take advantage of the safe harbor exemption in § 310.4(b)(5) unless it can demonstrate that it actually trains employees in implementing its "do-not-call" policy, and enforces that policy.

Finally, in the "safe harbor" provision in the proposed Rule, the Commission required that the seller or telemarketer use a process to prevent calls to telephone numbers on the national "do-not-call" list, employing a version of the "do-not-call" registry obtained from the Commission not more than 30 days before the calls are made, and to maintain records documenting this process.[795] Virtually all comments on the safe harbor provision were directed at the proposed 30-day requirement for using the registry, which would have required sellers and telemarketers to reconcile or "scrub" the names on the registry with their customer list every 30 days. Industry commenters were unanimous in their view that a 30-day requirement would be extremely burdensome.[796] They

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[794] *See, e.g.*, DC-NPRM at 6-7; Verizon-NPRM at 5. *But see* Patrick-NPRM at 5-6 (cautioning that the standards set forth in the "safe harbor" should be obligatory for all telemarketers subject to the Rule).

[795] This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

[796] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8; Household Credit-NPRM at 13; Household Finance-NPRM at 13; HSBC-NPRM at 2; Nextel-NPRM at

also pointed out that a 30-day requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists, and would be particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.[797] Industry commenters urged the Commission to require quarterly updating, which is the standard adopted by the majority of states in implementing their "do-not-call" statutes.[798] They pointed out that, after an initial period of "volatility" when consumers sign up for the new registry, the number of names on the registry will stabilize and there may not be as great a need for frequent updating.[799]

The Commission is persuaded that the costs of requiring monthly updating outweigh any additional benefits that might accrue to consumers from such a provision. Based on the record in this matter, the amended Rule modifies the "safe harbor" requirement that lists be reconciled every 30 days. Instead, re-numbered § 310.4(b)(3)(iv) of the amended Rule requires that the seller or telemarketer employ a version of the registry obtained not more than three months before any call is made, and maintain records documenting the process it uses to prevent telemarketing to any number on the list. Thus, telemarketers will be required to update their lists at

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26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[797] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[798] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8, 10; Household Credit-NPRM at 13, 15; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[799] *See* June 2002 Tr. I at 237-39.

least every three months, a time period that is consistent with most state requirements. Instead of making the list available on specific dates, the registry will be available for downloading on a constant basis, 24 hours a day, seven days a week, so telemarketers can access the registry at any time. As a result, each telemarketer's three-month period may begin on a different date. The Commission intends that the records documenting the process to prevent telemarketing calls to telephone numbers on the "do-not-call" registry will include copies of any express agreements the seller has obtained from consumers giving their permission for the seller to call, as well as documentation showing when and how often the seller has reconciled its list of names and/or telephone numbers against the national "do-not-call" registry.

The Commission is confident that the additional criteria in the amended Rule do not conflict with FCC regulations. FCC regulations are silent as to the process to be used, or the specific time frame within which the company must reconcile the names on its "do-not-call" list with its list of prospective customers to be called in a telemarketing campaign.[800] Therefore, any FTC requirement that there be a process in place to prevent calls to telephone numbers on a "do-not-call" list would not conflict with the FCC's regulations. Similarly, FCC regulations are silent as to the requirement to monitor compliance and take action to correct any non-compliance, or to maintain evidence of express verifiable written authorization to accept telemarketing calls. Thus, the proposed Rule would not conflict with the FCC's regulations. Furthermore,

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[800] FCC regulations require companies to reconcile "do-not-call" requests for company-specific lists on a continuing or ongoing basis. Specifically, 47 CFR § 64.1200(e)(2)(iii) requires the seller or telemarketer to record the consumer's "do-not-call" request and place the consumer's name and telephone number on the company's "do-not-call" list at the time the request is made. The TSR is silent as to how frequently a company must reconcile "do-not-call" requests for company-specific lists.

as discussed more fully above, the Commission believes that it is necessary for the amended Rule to diverge from FCC regulations by imposing a monitoring requirement in the "safe harbor" provision in order to clarify the applicability of the safe harbor.

§ 310.4(c)—Calling time restrictions

Section 310.4(c) of the original Rule proscribes the making of outbound telemarketing calls before 8:00 a.m. and after 9:00 p.m. local time at the called person's location.[801] In response to comments received during the Rule Review suggesting further limitations on calling times, the Commission noted in the NPRM that it declined to adopt further restrictions because the original Rule's calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry.

In response to the NPRM, the Commission received more than 100 comments from consumers on this issue, the vast majority of which recommended that the calling times be limited in some fashion. Many consumers urged that the calling times provision further restrict calls during the "dinner hour,"[802] or at either end of the day, arguing that calls that come at 8:00 a.m. or 9:00 p.m. are inconvenient, particularly for families with small children.[803] Some commenters urged the Commission to prohibit telemarketing on Saturdays, Sundays, or the entire weekend.[804] Still others urged the

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[801] *See* 16 CFR 310.4(c).

[802] *See, e.g.*, Harvey Butler (Msg. 197); Roy Broman (Msg. 452); Robert Clifton (Msg. 3762); Ernie and Helen Darrow (Msg. 9941); SSMBOYLE (Msg. 14401); Worsham-NPRM at 4.

[803] *See, e.g.*, John Hallberg Jones (Msg. 1644); Jim Coupal (Msg. 3504); Adam Block Willow (Msg. 3513); Donald Nelson (Msg. 4225); Lolla469 (Msg. 5115); Anonymous (Msg. 27184).

[804] *See, e.g.*, Sjkble (Msg. 12060) (no Saturday calls); OMEGA217 (no Sunday calls); David Meads (Msg. 13726) (no Sunday calls); Lisa

Commission to consider the plight of those shift workers for whom the current calling hours provide little or no protection from calls during "sleep time."[805]

The few industry comments regarding calling times were supportive of the current hours, but critical of the notion that allowing consumers to customize their preferred calling times via the national "do-not-call" registry would be workable.[806] EPIC noted that it favored retaining the current calling times provision, but found it desirable to allow consumers who wish to do so to set other preferred times via the national "do-not-call" registry.[807]

As noted in the NPRM, the Commission believes the current calling hours provide a reasonable window for telemarketers to reach their existing and potential customers. The Commission recognizes that while some consumers may find it objectionable to receive telemarketing calls between 8:00 a.m. and 9:00 p.m., the majority of consumers would not find calls within these hours to be particularly abusive of their privacy. Furthermore, consumers who wish to avoid telemarketing calls will, under the amended Rule, have the option of placing their telephone numbers on the national

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Hallman (Msg. 20291) (no Sunday calls); H00Kie (Msg. 1040) (no weekend calls); Lee C. Clayton (Msg. 1950) (no weekend calls); Sherrell Goggin (Msg. 2247) (no weekend calls); Henry Miller (Msg. 10173) (no weekend calls); Nanagusgus (Msg. 12471) (no weekend calls).

[805] *See, e.g.*, Paul Merchant, Jr. (Msg. 387); Bobby Morris (Msg. 639); Gayle Tanner (Msg. 4505); Anonymous (Msg. 27196).

[806] *See* ARDA-NPRM at 13 (noting it felt no need to comment on this provision because the Commission had proposed no modification, and urging that no customizable calling preferences be allowed); NAA-NPRM at 17.

[807] *See* EPIC-NPRM at 18, 22 (noting that while generally acceptable, the current calling times "represent only the Commission's judgment on what time of day people most value their privacy," and urging the Commission to allow for customizable calling time preferences).

"do-not-call" registry, thus blocking most unwanted calls at all times.[808] Therefore, the Commission declines to modify the calling hours prescribed by § 310.4(c), and retains this provision without amendment.

§ 310.4(d)—Required oral disclosures

Section 310.4(d) of the original Rule requires that a telemarketer in an outbound call make certain oral disclosures promptly, and in a clear and conspicuous manner. The NPRM proposed to make two minor modifications to the wording of this section. First, the Commission proposed inserting, after the phrase "in an outbound telephone call," the phrase "to induce the purchase of goods or services." This would clarify that § 310.4(d) applies only to telemarketing calls made to induce sales of goods or services (in contrast to proposed new § 310.4(e), which contains an analogous phrase clarifying that § 310.4(e) will apply to calls made "to induce a charitable contribution"). Second, the Commission proposed to add the word "truthful" to clarify that it is not enough that the disclosures be made; the disclosures must also be made truthfully. The amended Rule adopts both modifications, but also provides additional guidance on when the oral disclosures should be made in upsell transactions and what information should be disclosed in those situations.

The Commission received very few comments on these proposed changes. NAAG expressed its support for inclusion of the word "truthfully" in this section, noting that however obvious it might seem that mandatory disclosures be made truthfully, abuses have occurred when, for example, a telemarketer misstates the purpose of the call, claiming it is a "courtesy" call rather than a sales call.[809] The Commission agrees that the express requirement that the required dis-

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[808] *See* amended Rule § 310.4(b)(1)(iii)(B), discussed above.

[809] *See* NAAG-NPRM at 47.

closures be "truthful" will benefit consumers, and should impose no additional burden on telemarketers. Thus, this requirement is adopted in the amended Rule.

A few commenters recommended limiting or expanding the provision. ASTA urged the Commission to limit the applicability of parts of the oral disclosure provision so that sellers with whom a customer had a prior business or personal relationship would be exempt from making two particular disclosures: 1) that the purpose of the call is to sell goods and services (§ 310.4(d)(2)); and 2) the nature of the goods and services (§ 310.4(d)(3)).[810] ASTA argued that it does not believe "situations in which there is a prior business or personal relationship between the parties, are, in practice, subject to the same sort of abuses that the Rule seeks to address by way of [the § 310.4(d)(2) and (3) disclosures]."[811] Tribune made a similar argument, requesting an exemption from compliance with the § 310.4(d) disclosures for newspapers with whom a customer has a prior business relationship. According to Tribune, in many instances, newspapers call current subscribers to ascertain whether the customer is satisfied, and then to offer additional services, such as the weekday paper in addition to an existing Sunday-only subscription; Tribune also believes the required oral disclosures may be off-putting to customers.[812] The Commission does not believe that the existence of a prior or even an ongoing business or personal relationship obviates the need for the required prompt oral disclosures in calls that are, in whole or in part, designed to induce the purchase of goods or services. Therefore, the Commission declines to create exemptions to § 310.4(d).

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[810] *See* ASTA-NPRM at 2.

[811] ASTA-NPRM at 2.

[812] *See* Tribune—NPRM at 9-10.

DOJ recommended that an additional disclosure—the "seller's title or position in the company"—be added to this section, arguing that such a disclosure would directly address the fraudulent practice wherein a telemarketing sales agent misrepresents that he or she holds a position of great authority within the company on behalf of whom the call is made, such as a claim that he or she is the president of the company.[813] Although the Commission agrees that such misrepresentations could be injurious to consumers, the Commission does not believe that in non-fraudulent solicitations a prompt, truthful disclosure of the telemarketing sales representative's position within the company would be so beneficial to consumers as to outweigh the costs to business of making such an additional disclosure. Further, the Commission believes that it is highly likely that fraudulent telemarketers who resort to such prevarication to induce sales will be in violation of other provisions of the Rule as well.[814] Therefore, the Commission declines to add a disclosure regarding the telemarketing sales agent's position within the company.

A few commenters requested further clarification regarding the meaning of the term "promptly," suggesting that it is too vague to be a useful guideline in the Rule.[815] One of these commenters also sought to clarify the timing of the prompt oral disclosures required by this section in a multiple purpose

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[813] DOJ-NPRM at 5 (also noting that some fraudulent telemarketers claim to be with government agencies. The Commission notes that such a misrepresentation would violate amended Rule § 310.3(a)(2)(vii)).

[814] For example, such a "false and misleading" statement, if made to "induce any person to pay for goods or services or to induce a charitable contribution," would violate amended Rule § 310.3(a)(4).

[815] LSAP-NPRM at 17 (urging that the term "promptly" be defined as "at the outset of the call"); NASUCA-NPRM at 16; Patrick-NPRM at 3 (suggesting that at least the identity of the seller be disclosed "*first*, before any other information is disclosed").

call.[816] These two issues were discussed at length in the NPRM, and the Commission reiterates here what it has previously stated: 1) the term "promptly," as used in the Rule, means "at once or without delay, and before any substantive information about a prize, product or service is conveyed to the customer," a standard which allows for some flexibility without sacrificing the consumer's need to know certain material information prior to the beginning of any sales pitch; and 2) in "any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the [§ 310.4(d) disclosures] must be made 'promptly,' during the first part of the call, before the non-sales portion of the call takes place."[817] The Commission does not believe that any change in the text of the Rule is necessary to achieve clarity regarding these two issues, nor does it believe the suggested modifications would provide greater clarity; thus, the Commission declines to modify this section.

A few commenters suggested that an additional disclosure—of the seller's telephone number—should be added.[818] NASUCA suggested that this number be one useful to consumers who wish to be placed on a seller's "do-not-call" list, while Patrick suggested that the number be one consumers could use to report violations of the Rule. Patrick suggested, in the alternative, that the Rule prohibit the failure to provide name, address, and telephone number information for the seller or telemarketer, if such information is requested by the consumer. The Commission previously has expressed its concern that if too many disclosures are required, particularly in the beginning of the call, their effectiveness is diluted. Further, the Commission believes that amended

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[816] *See* NASUCA-NPRM at 16.

[817] 67 FR at 4526 (citing the original SBP).

[818] NASUCA-NPRM at 15; Patrick-NPRM at 4.

§ 310.4(a)(7), regarding transmission of Caller ID, and § 310.4(b)(1)(iii)(B), creating a national "do-not-call" Registry, will help to mitigate the problem these commenters have proposed to cure. Therefore, the Commission declines to require a disclosure of the seller's telephone number in this section.

As explained in the discussion of § 310.2(dd) above, regarding the definition of "upselling," the Commission believes that upsell transactions are analogous to outbound telephone calls. Therefore, the amended Rule requires that the oral disclosures mandated by § 310.4(d) must be promptly disclosed at the initiation of the upsell if any of the information in these disclosures differs from the disclosures made in the initial transaction. For example, in an external upsell (where there is a second seller), the consumer must be told the identity of the second seller—the one on whose behalf the upsell offer is being made. In an internal upsell, however, the identity of the seller remains the same in both transactions and need not be repeated in the second transaction. Thus, the Commission has inserted the phrase "or internal or external upsell" after the term "outbound telephone call" in § 310.4(d) of the amended Rule; and has inserted the requirement that "in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent the information in the upsell differs from the disclosures provided in the initial telemarketing transaction." The goal in this provision is to ensure that consumers receive all of the information they need in order to make an informed decision whether to make a purchase,[819] without requiring duplicative or irrelevant disclosures.

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[819] As the Commission noted in the NPRM:

> "[I]n external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on

§ 310.4(d)(4)—Sweepstakes disclosure

Section 310.4(d)(4) of the original Rule required that a telemarketer promptly disclose that no purchase or payment is necessary to be eligible to win a prize or participate in a prize promotion if a prize promotion is offered. In the NPRM, the Commission proposed to modify § 310.4(d)(4) to require that the telemarketer disclose that a purchase will not enhance a customer's chances of winning a prize or sweepstakes, which would make the amended Rule's disclosure requirement consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act ("DMPEA").[820] As discussed above with regard to the same disclosure in § 310.3(a)(1)(iv), commenters generally supported this proposal.[821]

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behalf of two distinct sellers, it is crucial that consumers . . . clearly understand that they are dealing with separate entities. In the original Rule, the Commission determined that a disclosure of the seller's identity was necessary in every outbound call to enable the customer to make a fully-informed purchasing decision. In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or one in which a single telemarketer offers the goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services."

67 FR at 4500. The proposed Rule also required telemarketers on behalf of charitable organizations to adhere to the requirements for upsell transactions. However, the record in this proceeding does not show any evidence that upselling is prevalent in the solicitation of charitable contributions. Therefore, the Commission has deleted any reference to charitable solicitations from the upselling provisions. The Commission will continue to monitor this issue, and, if necessary, may address it in future rule reviews.

[820] *Id.* 39 U.S.C. 3001(k)(3)(A)(II).

[821] NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4. *See also* June 2002 Tr. II at 105-15.

PMA maintained that the disclosure was unnecessary and that there was no evidence in the record to support adding the disclosure.[822] Nonetheless, PMA stated that, as a gesture of good faith, they would not oppose the change.[823] They asked, however, that the Commission allow them flexibility on when to make the disclosure, rather than mandating that it be made "promptly," as required by § 310.4(d), because the disclosure would be more meaningful if it were delivered in conjunction with the sales solicitation rather than the discussion about the sweepstakes.[824]

The Commission believes that it is important that consumers promptly be put on notice when a call promoting a sweepstakes also includes a sales solicitation. The Commission does not believe it necessary to script the telemarketing call or to define with finite specificity within how many seconds particular disclosures must be made. As with the Rule's requirement that the telemarketer promptly disclose that no purchase or payment is necessary to win a prize,[825] the Commission believes that the disclosure that a purchase will not enhance the consumer's chances of winning may occur "before or in immediate conjunction with the description of the prize."[826] As the Commission stated in the original Rule's SBP, this language was included in § 310.4(d)(4) "to prohibit deceptive telemarketers from separating the disclosure (in that instance, of the fact that no purchase or payment is

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[822] PMA-NPRM at 4-8.

[823] PMA-NPRM at 5, 7; ARDA-NPRM at 14-15. *See also* June 2002 Tr. II at 106, 108 (PMA and ARDA state that they do not oppose the disclosure).

[824] June 2002 Tr. II at 106-07. ARDA also requested flexibility in the timing of the disclosure. ARDA-NPRM at 14-15 and June 2002 Tr. II at 108.

[825] This provision is found at § 310.4(d)(4) of the original and amended Rules.

[826] 16 CFR 310.4(d)(4); 60 FR at 43856.

necessary to win a prize) from the description of the prize, thereby negating or diluting its salutary effect."[827] Although this guidance does not alter the imperative that the disclosures be made "promptly"—i.e., "at once or without delay," but "[a]t a minimum. . . before any sales pitch is given"[828]—it should provide telemarketers of prize promotions the necessary flexibility in making the requisite disclosures.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to fail to disclose truthfully, promptly, and in a clear and conspicuous manner, in any prize promotion, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the customer's chances of winning, and, upon request, the no-purchase/no-payment method of participating in the prize promotion.

§ 310.4(e)—Required oral disclosures in charitable solicitations

As noted in the NPRM, § 1011(b)(2)(D) of the USA PATRIOT Act mandates that the TSR include a requirement to address abusive practices in the solicitation of charitable contributions.[829] Specifically, the USA PATRIOT Act directs the Commission to include in the Rule:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and to make such other

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[827] 60 FR at 43856-57.

[828] TSR Compliance Guide at 15. *See also* 60 FR at 43856.

[829] *See* 67 FR at 4522 (discussing the USA PATRIOT Act's mandate to include in the TSR certain prompt disclosures in the solicitations of charitable contributions).

> disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.[830]

In response to this mandate, the Commission included in the proposed Rule new § 310.4(e), which requires in calls to solicit charitable contributions the truthful, prompt, clear and conspicuous disclosure of two pieces of information: 1) the identity of the charitable organization on behalf of which the request is being made; and 2) that the purpose of the call is to solicit a charitable contribution.[831] The Commission declined to require the oral disclosure of a charitable organization's mailing address because it was dubious that requiring disclosure of this information in every instance would prove sufficiently beneficial to consumers to justify the costs incurred by telemarketers, and the charities for whom they solicit, of making this disclosure.[832] However, the Commission did pose specific questions on this issue, including whether the disclosure requirement should be triggered only when a donor asks for such information.[833]

Few comments addressed the proposed requirements for disclosures in the solicitation of charitable contributions.[834] AFP agreed that the proposed Rule struck the appropriate balance, by requiring disclosure of both the identity of the charity and the fact that the purpose of the call was to solicit a

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[830] Section 1011(b)(2)(D), Pub. L. 107-56 (Oct. 26, 2001).

[831] Proposed Rule § 310.4(e); *see also* 67 FR at 4522 (including the discussion of the rationale for including these specific disclosures).

[832] 67 FR at 4522.

[833] 67 FR at 4522, 4539.

[834] As noted above in the section discussing amended § 310.3(d), AARP and NCL noted in their comments in response to the NPRM that they supported the goal of expanding the Rule's ambit to cover charitable solicitations.

charitable contribution, but not requiring disclosure of the mailing address of the charity.[835] AFP also noted that the required disclosures are consistent with its own ethics standards and its belief that these disclosures are sufficient to effectuate the purposes of the USA PATRIOT Act.[836] AFP recommended against including a required disclosure of the charitable organization's mailing address, arguing that such information would be of little use to consumers in discerning whether a charity was legitimate, and that the time and distraction involved in disclosing an address would be "counterproductive to the charitable contribution process."[837]

Hudson Bay expressed its view that both of the proposed disclosures are unconstitutional.[838] According to Hudson Bay, the requirement that a telefunder promptly disclose that the call is to solicit a charitable contribution runs afoul of the First Amendment because it mandates not only what must be said, but when.[839] Hudson Bay further argues that the mandatory disclosure of the name of the charitable organization on behalf of which the solicitation is made strips charitable organizations of their right to anonymity and violates the First Amendment's guarantee of freedom of association.[840]

As previously noted, the USA PATRIOT Act directs the Commission to include these specific disclosures in the TSR.[841] Congress' purpose in the Telemarketing Act, in

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[835] *See* AFP-NPRM at 3.

[836] *Id.*

[837] *Id.* (noting, however, that it had no objection to requiring the disclosure of the mailing address, provided the donor asked for such information).

[838] *See* Hudson Bay-Goodman-NPRM at 6-7.

[839] *Id.* (*citing Riley*, 441 [sic] U.S. at 791).

[840] *Id.* at 7 (*citing Talley v. California*, 362 U.S. 60 (1960)).

[841] USA PATRIOT Act, § 1011.

requiring telemarketers to disclose basic identifying information in unsolicited outbound telemarketing calls, is to ensure that the consumer is given information promptly that will enable the consumer to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion. The Commission believes that the USA PATRIOT Act amendments are consistent with this purpose. Moreover, the Commission believes there is a tight nexus between this purpose and the statutory and regulatory means employed to achieve this purpose. The Commission also believes that these disclosure requirements are very narrowly tailored to impinge as little as possible on protected speech while still accomplishing the purpose Congress intended. The Commission has exercised restraint in implementing this statutory mandate, keeping the disclosure requirements for charitable solicitation telemarketing to the bare minimum necessary to fulfill the purpose of the USA PATRIOT Act amendments. The Commission notes that the Supreme Court has specifically noted that requiring a professional fundraiser "to disclose unambiguously his or her professional status . . . [is a] narrowly tailored requirement [that] would withstand First Amendment scrutiny."[842] The Commission believes that if a requirement to disclose one's status as a professional fundraiser would pass First Amendment scrutiny, then so would a requirement to make the disclosures now required by the Rule to fulfill the mandate of the USA PATRIOT Act amendments.

Some commenters recommended that the Commission expand the provision to require additional disclosures in certain circumstances. For example, NAAG recommended that, in the event a paid telefunder is making the charitable solicitation, three additional disclosures be required: "(1) the name of the caller; (2) the name of the telemarketing

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[842] *Riley*, 487 U.S. at 799, n.11.

company; and (3) the fact that the caller is being paid to solicit."[843] NCL concurred, suggesting that the Rule require fundraisers to "identify themselves as well as the charities on whose behalf they are operating."[844] NAAG and NCL argued that this additional set of disclosures would provide three distinct benefits. First, such disclosures would prevent donors from being deceived about the identity of the solicitor. NAAG noted that in many instances, for-profit fundraisers "misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling."[845] Second, the information would serve as an important means of identifying potential Rule violators.[846] The third benefit from these suggested disclosure requirements would be the triggering role they would serve, prompting consumers to inquire, of the telefunder or of a state regulatory agency, about the amount of their contribution that will go to charity after the fundraiser takes its share.[847]

The Commission declines to add a mandatory disclosure of the name of the caller in calls to induce charitable contributions. In the initial proposed TSR, the Commission had included such a requirement for all outbound telephone calls;[848] but it was deleted because commenters noted that "'desk names' are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice and harassment."[849] The Commission

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[843] NAAG-NPRM at 52.

[844] NCL-NPRM at 11. *See also* Make-A-Wish-NPRM at 6 (recommending adding a disclosure that the professional fundraiser is being paid for its services); NASCO-NPRM at 6.

[845] NAAG-NPRM at 52.

[846] NCL-NPRM at 11.

[847] NAAG-NPRM at 52; *see also* NCL at 11.

[848] *See* 60 FR at 8331 (§ 310.4(d)(1)(i)).

[849] 60 FR at 30418.

concluded that the disclosure of the seller's identity is most meaningful to consumers, not the name of the individual with whom they are speaking. The Commission can conceive of no reason why this analysis would not apply with equal force in the context of charitable solicitations. Moreover, the Commission is not persuaded that disclosure of this information is necessary to advance the privacy objectives underlying the Commission's authority to prohibit "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.[850] Therefore, the Commission declines to include in the amended Rule a requirement that the caller's name be disclosed in charitable telemarketing solicitations.

The Commission also declines to adopt the suggestion that it mandate disclosure of the name of the telemarketing company.[851] In adopting the original Rule, the Commission rejected such a disclosure in the context of the sale of goods or services because it was deemed unnecessary; rather, a requirement to disclose the identity of the seller—which is clearly material to the consumer—was included. In the charitable fundraising context, the Commission believes the identity of the charity is the analogous material item of information. The Commission believes there is a limit to the number of distinct items of information that can reasonably be absorbed at the beginning of a solicitation call. This being the case, the Commission believes that the charity's identity is a more meaningful piece of information than the name of

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[850] *See* discussion of § 310.4 above, describing the Commission's analysis of its authority to prohibit "abusive" practices.

[851] The Commission notes, however, as discussed by NAAG, that at least 20 states have statutes requiring such a disclosure. NAAG-NPRM at 52. The Commission believes that the states, which have extensive regulatory authority over charities, and extensive experience in such regulation, may continue to require disclosures beyond those mandated by the TSR, and notes that compliance with the TSR will not fulfill telemarketers obligations under any such state laws or regulations.

the professional fundraising company. In this regard, it is noteworthy that the USA PATRIOT Act did not specifically require such a disclosure.[852] Arguably, disclosure of the identity of the telemarketer may be beneficial to potential donors because it may prompt them to think and inquire about the portion of a contribution that will be consumed by a professional fundraiser's fee; but the Commission believes the record falls short of showing that the benefits of mandating such a disclosure would outweigh the burdens it would impose upon legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.[853] Therefore, the Commission does not believe the current record supports a finding that disclosure of this information is necessary to prevent "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.[854]

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[852] *See* USA PATRIOT Act § 1011(b)(2)(D). The absence of such a requirement from the USA PATRIOT Act is noteworthy because such a disclosure was specifically approved in Riley. 487 U.S. at 799, n.11.

[853] As noted by Not-for-Profit Coalition, Hudson Bay and others, telefunders play a critical role in enabling charitable organizations, particularly smaller ones, to raise funds necessary to fund their missions. Not-for-Profit Coalition-NPRM at 17-20; Hudson Bay-Goodman-NPRM at 2.

[854] The Commission believes that, as in the case of the required oral disclosures in the sale of goods or services, the failure to make certain material disclosures in the solicitation of a charitable contribution rises to the level of an abusive practice under the Rule. As noted in the NPRM, the Commission believes that the prompt disclosure of certain information in a telemarketing call to induce the sale of goods or services is necessary to enable a consumer "to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion." 67 FR at 4511. Similarly, a consumer who receives a telemarketing solicitation to induce a charitable contribution must have certain information to determine if he or she wishes to continue the call. At this time, the Commission believes it prudent to require only the disclosure of the name of the charity on whose behalf the fundraising is occurring and that the call is being made to induce a charitable contribution. However, the Commission will continue to study the issue and will revisit it during the next Rule Review.

For similar reasons, the Commission also declines to require a mandatory disclosure that the telemarketer is a paid fundraiser. The comments on this issue reflect considerable concern about instances where only a minuscule portion of contributions are devoted to the actual support of a charitable organization's mission, while the telefunder's fee gobbles up the lion's share. This occurs in some instances,[855] but the record does not support an inference that such a scenario inevitably follows from the use of paid telefunders by charitable organizations, and there is evidence on the record tending to show that the opposite is often true: the use of professional telemarketers saves charitable organizations money—as compared with in-house telephone fundraising.[856]

Additionally, the Commission is concerned here, as it is with the other recommended disclosures, about the potential negative consequences that derive from overloading the beginning of a charitable solicitation call. Further, it is notable that the USA PATRIOT Act did not specifically require such a disclosure.[857] While disclosure of the identity of the telemarketer may, arguably, be beneficial to potential

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[855] *See, e.g.*, Pennies for Charity, 2001, New York Attorney General, http://www.oag.state.ny.us/charities/pennies01/penintro.html (accessed Oct. 8, 2002) (stating that "charities retained an average of 31.5% of the funds raised by telemarketers registered to solicit contributions in New York in 2000. Some of the charities received much less than that and some received nothing at all."); NASCO-NPRM at 2 (citing the New York Attorney General's report as well as a 1999 report by the California Attorney General showing charities received only 48.2 percent of funds raised by telemarketers who solicited on their behalf in California that year). *See also* Private Citizen-NPRM at 5.

[856] Hudson Bay-Goodman-NPRM at 2.

[857] *See* USA PATRIOT Act § 1011(b)(2)(D). This omission, too, is conspicuous in light of the fact that numerous states have included this mandatory disclosure and that such a disclosure is, at least in dicta, sanctioned by the Court in *Riley*. *See* NAAG-NPRM at 52; *Riley*, 487 U.S. at 799, n.11.

donors because it may prompt them to think and inquire about the proportion of a contribution that will be consumed by a professional fundraiser's fee, the Commission believes the record does not support mandating such a disclosure because of the burden the disclosure would impose on legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.[858] A showing of these benefits would be necessary to support a requirement for disclosure of this information. Therefore, the Commission declines at this time to add a requirement that the telemarketer disclose that he or she is being paid to solicit charitable contributions.

Other issues regarding abusive practices raised in response to the NPRM.

Commenters responded to the Commission's questions in the NPRM regarding additional issues related to abusive practices that had surfaced during the Rule Review, in particular, prison-based telemarketing. Commenters also raised other issues: telemarketers' use of courier services to pick up payments from consumers; telemarketers' targeting of vulnerable groups; and the sale of victim lists. Each of these issues, and the reasoning behind the Commission's responses to them, are discussed in detail below.

Prisoner telemarketing: During the Rule Review, the Commission received several comments describing problems that had occurred when sellers or telemarketers used prison inmates to telemarket goods or services. These commenters recommended that the Commission ban the use of prisoners as telemarketers or, in the alternative, tightly regulate it, including requiring that inmates disclose their status as prisoners when they make calls to, or receive calls from, the

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[858] *See* note 856 above.

public.[859] These commenters cited several graphic incidents in which inmates have abused consumers' information and other resources to which they had access through inmate telemarketing to make improper, invasive, and illegal contact with members of the public.[860]

Specifically, these commenters pointed out that, while working as telemarketers, inmates inevitably gain access to personal information about individuals, including minors, that may endanger the lives and safety of those they call.[861] In the NPRM, the Commission stated that it was extremely concerned about the potential misuse of personal information and abusive telemarketing activity in connection with prison-based telemarketing, but also that some public benefit likely came from inmate work programs that entail telemarketing.

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[859] *See generally* Jordan-RR, S. Gardner-RR, Budro-RR, and Warren-RR. In addition, this issue received considerable attention during the Rule Review Forum. *See* RR Tr. at 220-45, 367-75, 443-47.

[860] For example, in its 1997 report to Congress on the privacy implications of individual reference services, the FTC cited an example where a prison inmate (and convicted rapist), who was employed as a data processor, used his access to a database containing personal information to compose and send a threatening letter to an Ohio grandmother. *See* FTC, "Individual Reference Services: A Report to Congress" (Dec. 1997), at 16. Several states, including Wisconsin, Nevada, and Massachusetts, have considered legislation that would require their Departments of Correction to restrict prisoners' access to personal information about individuals who are not prisoners and/or to require prisoners conducting telephone solicitations or answering inbound calls to identify themselves as prisoners. The Utah State Prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain. *See Prison to End Telemarketing By Inmates*, SALT LAKE TRIB., June 1, 2000, at B1. In addition, DMA noted that it had supported legislation banning the use of inmates in remote sales situations because these sales require the telemarketer to get personal information from the consumer. *See* RR Tr. at 371-72.

[861] *See generally* Jordan-RR, Gardner-RR, Warren-RR, and Budro-RR.

The Commission noted that the record contained insufficient information upon which to base a proposal regarding prisoner telemarketing or to assess the costs and benefits of such a proposal. Therefore, the NPRM posed several questions to elicit comment on what action by the Commission, if any, might be appropriate regarding this issue.

In response to the NPRM, the Commission received several comments on this issue.[862] In addition, the June 2002 Forum devoted a session to the topic.[863] Based on the entire record in this proceeding, the Commission has determined that any problems associated with the use of prison-based telemarketing would be more appropriately handled by the state legislatures and regulatory agencies than by adding a provision to the TSR.

The comments show that the number of inmates used for commercial telemarketing purposes is a small percentage of the prisoners who are employed in inmate work programs.[864] The majority of prison-based telemarketing programs are used by federal and state governments, often for

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[862] DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. In addition, *see generally* CURE-NPRM; CCA-NPRM; UNICOR-NPRM; EPI-NPRM; and EPI-Supp.

[863] June 2002 Tr. III at 115-57.

[864] The comments indicate that federal inmates are not used as telemarketers except in connection with sales to the federal government. (UNICOR is the trade name for Federal Prison Industries, Inc., a wholly-owned government corporation within the U.S. Department of Justice, Federal Bureau of Prisons. UNICOR sells its products primarily to federal agencies and uses federal prisoners in connection with those sales. In addition to calling UNICOR's federal government agencies, the federal prisoners also call the businesses that support UNICOR's federal sales.) UNICOR-NPRM at 2; *see also* EPI-Supp. at 1. UNICOR's sales using prisoner-based telemarketing would not be covered by the TSR. Section 310.6(g) of the Rule exempts telemarketing sales to businesses. In addition, sales to government entities do not fall within the Rule's definition of "person."

such tasks as providing information to consumers who call state tourist bureaus.[865] A 1999 GAO Report reveals that only seven percent of the inmates who had access to consumer information were performing work for private firms, while 93 percent were working for government agencies, performing tasks such as answering calls from the public to state tourist centers.[866] Thus, the vast majority of prison-based telemarketing would be outside the ambit of the Rule because it does not involve "telemarketing" as that term is defined in the Rule.[867]

EPI estimates that there are only ten private companies in the United States who use prisoners as telemarketers, that these ten companies employ approximately 300 inmates in prison-based telemarketing programs, and that all these programs use inmates housed in state prisons.[868] Commenters noted that the state prison work programs are heavily regulated by the state legislatures and Departments of Correction.[869] EPI points out that the federally-administered Prison Industry Enhancement ("PIE") program was created to encourage the states and local governments to establish inmate work programs that mimic the private work

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[865] EPI-Supp. at 1.

[866] "Prison Work Programs, Inmates" Access to Personal Information," GAO/GGD-99-146, cited in EPI-NPRM at 13, n.18. *See also* EPI-Supp. at 1 (All prisoners employed as telemarketers by the private sector are inmates in state prisons, regulated by state agencies.).

[867] "Telemarketing" is defined, in part, as a "plan, program or campaign which is conducted to induce the purchase of goods or services or a charitable contribution . . ." The prison-based telemarketing used by government agencies does not appear to involve calls to "induce the purchase of goods or services."

[868] EPI-NPRM at 2, 3, 9.

[869] CCA-NPRM at 2; EPI-NPRM at 3, 14.

environment. In passing the legislation, Congress elected to have the states manage these programs.[870]

Opponents of the use of prison-based telemarketing cited the potential for misuse of consumers' personal information by inmates, but were unable to point to actual incidents other than the isolated example raised during the Rule Review.[871] EPI noted that, after an exhaustive search, the 1999 GAO study was able to identify only nine incidents of misuse over an eight-year period, and only three of those nine incidents were the result of telemarketing for a private firm.[872] Commenters noted that similar problems occur, perhaps with even more frequency, among non-prisoner or civilian telemarketers.[873]

The proponents of prison-based telemarketing pointed out the significant social and economic benefits that accrue to the inmates, to the states, and to society as a whole by having inmates engage in productive work that develops skills that can later be transferred to a private sector job once the inmate is released.[874] They indicate that inmate jobs serve as a source of funds to compensate crime victims, provide financial support to children of inmates, repay taxpayers for the inmates' room and board, and are an effective tool for rehabilitation and reducing recidivism.[875] They maintain that inmate jobs are "vital to helping keep prisons safe and secure and offering meaningful educational and vocational training

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[870] EPI-NPRM at 3.

[871] DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. *See also* June 2002 Tr. III at 115-57.

[872] EPI-NPRM at 10.

[873] CURE-NPRM at 1; EPI-NPRM at 13-14. *See also* June 2002 Tr. III 115-57.

[874] *See generally* CURE-NPRM; CCA-NPRM; EPI-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

[875] *Id.*

to aid in successful re-entry."[876] These commenters outlined the significant precautions taken in screening and monitoring inmates for these jobs.[877]

Based on the record in this proceeding, the Commission believes that, while there is some evidence of consumer injury in a very few documented cases, it is not possible to conclude that the risk of consumer harm outweighs the countervailing benefits. Such a conclusion would be necessary to condemn prison-based telemarketing as an abusive practice.[878] The extensive system of state regulation, coupled with the local nature of the work programs, persuades the Commission that any problems associated with prison-based telemarketing would best be handled at the state level.

Use of couriers: In response to the NPRM, AARP again raised its concern that the Commission ban the practice of allowing couriers, including overnight mail delivery services, to pick up payment for goods and services purchased through telemarketing.[879] AARP points out that the use of couriers in sweepstakes and lottery scams is prevalent, and that some unscrupulous telemarketers use couriers not only to quickly separate the consumer from his or her money, but to make a "contest seem more 'official.'"[880] AARP notes that, in some instances, even legitimate companies benefit unfairly from the use of couriers by avoiding oversight by the U.S. Postal Service, and by ensuring that non-refundable "deposits" are secured, diminishing the likelihood, in many instances, that a

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[876] CCA-NPRM at 1. *See also* EPI-NPRM at 5-8; and generally CURE-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

[877] EPI-NPRM at 5-8. *See also* June 2002 Tr. III at 115-57.

[878] *See* 67 FR at 4510-12.

[879] AARP-NPRM at 9-10.

[880] *Id.* (citing NAAG's comment in the original rulemaking proceeding).

consumer would back out of a transaction.[881] NACAA concurred, and noted its further concern that in-person payment pickups by those posing as public safety officers is a practice perhaps even more harmful to consumers who are intimidated into quickly giving a contribution.[882]

The record does not contain any new evidence regarding the potential harm that accrues from the use of couriers, or any new evidence regarding the benefits to legitimate companies of being able to use couriers to collect payment. Although the Commission recognizes that fraudulent telemarketers often use couriers to collect payment, it continues to believe that "[t]here is nothing inherently deceptive or abusive about the use of couriers by legitimate business."[883] Moreover, the Commission reiterates its view that telemarketers who seek to use courier services to defraud consumers are likely to "engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule."[884] Therefore, the Commission declines to adopt the recommendation to ban the use of couriers to collect payment for goods or services sold through telemarketing.

Targeting vulnerable groups and the sale of victim lists: DOJ proposed that the Commission include in the amended Rule a provision that "would prohibit a seller or telemarketer who is engaged in any act or practice that violates §§ 310.3(a), (c), or (d) or 310.4(a)-(e) from purchasing lists of prospective contacts from any source."[885] This suggested change responds to the problems of the sale of victim lists and the targeting of vulnerable groups. As DOJ explains, such

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[881] AARP-NPRM at 9-10.

[882] *See* NACAA-NPRM at 10-11.

[883] 60 FR at 30415.

[884] *Id.*

[885] DOJ-NPRM at 7.

a provision would "ensure that any injunctive relief it sought in enforcement proceedings would include a prohibition on any further purchases of 'mooch lists' by any individual or corporate defendants in the action," and lay the foundation for criminal contempt proceedings if such an injunction were violated.[886] DOJ also argued that such an injunction, served on "any list provider known to have done business with the fraudulent telemarketer," would limit such telemarketer's ability to resume fraudulent solicitations.[887] Finally, DOJ noted that such a provision "would enable the Commission to address, at least in part, the targeting of vulnerable victims by fraudulent telemarketers, without having to grapple with the difficulties of defining what constitutes "vulnerability" or "targeting."[888]

After careful consideration, the Commission has determined not to adopt the provision proposed by DOJ. The Commission believes that it is unnecessary to include an explicit prohibition against Rule violators purchasing lists of prospective contacts to provide the benefits detailed by DOJ in its comment. In numerous cases, the Commission has already included a similar prohibition in final orders that achieves the goals articulated by DOJ.[889] Thus, the

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[886] *Id.*

[887] *Id.*

[888] *Id.*

[889] *See, e.g., FTC v. Fed. Data Servs.*, No. 00-6462-CV-Ferguson (S.D. Fla. filed Apr. 3, 2000) (Stipulated final judgment entered Jan. 9, 2001); *FTC v. Data Med. Capital*, Inc., No. SA-CV-99-1266AHS (EHC) (S.D. Cal. filed Oct. 14, 1999) (Stipulated final order for permanent injunction and other settlement of claims entered July 13, 2001); *FTC v. RJB Telecom, Inc.*, No. CIV002017PHXEHC (D. Ariz. filed Oct. 25, 2000) (Stipulated final judgment and order for permanent injunction filed Aug. 27, 2001); *FTC v. Story d/b/a Network Publ'ns.*, No. 3-99CV0968-L (N.D. Tex. filed Apr. 25, 1999) (Stipulated order for permanent injunction and civil penalty filed June 6, 2000).

Commission declines to include a provision to this effect in the amended Rule.

E. Section 310.5—Recordkeeping

Section 310.5 of the original Rule identifies the kinds of records that must be kept by sellers and telemarketers, and the time period for retention of these records.[890] In the NPRM, the Commission noted that it had declined to adopt any of the suggested modifications to this section submitted pursuant to the Rule Review. Specifically, the Commission declined to: (1) reduce the record retention period to less than 24 months; or (2) tie the duration of record retention either to the value of the goods or services sold or the refund policy of the seller, believing that such modifications would minimize the effectiveness of this provision in law enforcement.[891] The Commission did note that the effect of the USA PATRIOT Act amendments was to extend the recordkeeping requirement to include not only calls to induce the purchase of goods or services, but also calls to induce charitable contributions.[892] The only explicit change to the language of the section to implement the USA PATRIOT Act amendments was to add the phrase "or solicitations of charitable contributions" to § 310.5(a)(4) following the phrase "employees directly involved in telephone sales."[893]

Very few comments addressed the recordkeeping requirements set forth in § 310.5. ARDA noted that it "agrees with the Commission and feels that the current provisions are

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[890] 16 CFR 310.5.

[891] 67 FR at 4527-28.

[892] 67 FR at 4528.

[893] Due to an oversight, the text of the NPRM noted the correct language of the provision ("or solicitations of charitable contributions"), while the text of the proposed Rule included an abbreviated version ("or solicitations").

adequate."[894] DMA-NonProfit stated that "imposing burdensome and lengthy (two-year) recordkeeping responsibilities" on charities would hurt the ability of charities, especially small ones, because it would divert funds away from fulfillment of charities' missions.[895] The Commission believes that the recordkeeping burden on telemarketers who solicit on behalf of charities will be minimal. As noted in the SBP for the original Rule, the recordkeeping provision was already tailored to "strike a balance between minimizing the recordkeeping burden on industry and retaining the records necessary to pursue law enforcement actions. . ."[896] In addition, the Commission believes that the records required to be maintained are those commonly maintained by businesses in the ordinary course of business.[897] The Commission believes that, as applied to telemarketers who solicit on behalf of charities, the burden of compliance with the recordkeeping provision will be further lessened because many of the recordkeeping provisions will be inapplicable in the charitable solicitation context, or are burdens typically borne by the telemarketer, not the organization on whose behalf the calls are made.[898]

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[894] ARDA-NPRM at 17. ARDA did reiterate, however, its concern that "overlapping, inconsistent, and conflicting state laws create a substantial burden."

[895] DMA-NonProfit-NPRM at 16.

[896] 60 FR at 43857.

[897] *Id.*

[898] For example, § 310.5(a)(2) only applies when the offer includes a prize promotion, a circumstance unlikely to be implicated in most charitable solicitations. Section 310.5(a)(3) only applies in the commercial solicitation context, as it requires maintenance of records showing information about "customers." Section 310.5(a)(4) is a requirement typically borne by telemarketers, and the Commission believes that charitable organizations are unlikely to incur additional costs of compliance with this provision as a result of the Rule's inclusion of charitable solicitations. The Commission does not believe that compliance with amended

NEMA requested that the Commission consider the record-keeping burden on energy marketers who must, pursuant to their self-regulatory guidelines, already maintain certain records.[899] As noted above in the discussion of the express verifiable authorization provision, § 310.3(a)(3)(ii), the Commission believes that sellers, when they accept payment via methods that are novel or lack certain fundamental consumer protections, must obtain express verifiable authorization by any of the three means allowed by the amended Rule. The maintenance of such records is also necessary to ensure the law enforcement goals of the recordkeeping provision.

Finally, ERA noted in its supplemental comment that it believed that it would be expensive for telemarketers conducting upsells to comply with the Rule's recordkeeping requirements.[900] As addressed above in the discussion of § 310.4(a)(6), the Commission believes that both because the cost of digital audio recording and storage is decreasing, and because of the limited circumstances in which such recording is required under the Rule, the burden on sellers who choose to market goods and services using a combination of a "free-to-pay conversion" coupled with preacquired account information is offset by the consumer protection benefits that

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§ 310.5(a)(5), which requires that all verifiable authorizations or records of express informed consent or express agreement required to be provided under the Rule be maintained will be unduly burdensome to charities who are less likely to avail themselves of the marketing methods that implicate these Rule requirements. Therefore, the only provision of the record-keeping section that is likely to affect charities is § 310.5(a)(1), the requirement that "[a]ll substantially different advertising, brochures, telemarketing scripts, and promotional materials" be maintained. To the extent that retention of such materials is not already customary in the non-profit sector, the Commission believes that the burden of compliance is offset by the corresponding law enforcement benefits that accrue from this provision.

[899] NEMA-NPRM at 8-10.

[900] ERA-Supp. at 7.

will accrue from recording and maintaining consumers' express informed consent in these circumstances.

Thus, the only modification to the language of § 310.5 (a)(5) in the amended Rule is to require that in addition to retaining all verifiable authorizations, a seller or telemarketer must keep all "records of express informed consent or express agreement" for 24 months. This modification is necessitated by the introduction of these two terms in § 310.4(a)(6), dealing with unauthorized billing, and § 310.4(b)(1)(iii)(B)(i), addressing permission to a seller to call despite a consumer's inclusion on the national "do-not-call" registry. The Commission believes it is necessary for a seller or telemarketer to retain such records of express informed consent and express agreement to enable the Commission and the states to determine compliance with these provisions of the Rule.

F. Section 310.6—Exemptions

Section 310.6 exempts certain telemarketing activities from the Rule's coverage.[901] The exemptions to the Rule were designed to ensure that legitimate businesses are not unduly burdened by the Rule.[902] Based on the record in this proceeding, and on its law enforcement experience, the Commission has determined to add an exemption, § 310.6(a), to

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[901] Specifically, the original Rule exempts: (1) goods and services subject to the Commission's Pay-Per-Call Rule and Franchise Rule; (2) telemarketing sales consummated after face-to-face transactions; (3) inbound telephone calls that are not the result of any solicitation by the seller or telemarketer; (4) telephone calls in response to a general media advertisement (except those related to investment opportunities, credit repair, "recovery," or advance fee loan services); (5) inbound telephone calls in response to direct mail solicitations that truthfully disclose all material information (except solicitations relating to prize promotions, investment opportunities, credit repair, "recovery," or advance fee loan services); and (6) business-to-business telemarketing (except calls involving the retail sale of nondurable office or cleaning supplies).

[902] 60 FR at 43859.

specifically exempt outbound calls to solicit charitable contributions from the national "do-not-call" registry provisions of the amended Rule. In addition, the Commission has determined to modify each of the subsections of the original Rule that are now found in renumbered § 310.6(b).

The Commission amends newly renumbered §§ 310.6 (b)(1), (2), and (3)[903] to require telemarketers and sellers of pay-per-call services, franchises, and those whose sales involve a face-to-face meeting before consummation of the transaction, to comply with the "do-not-call" and certain other provisions of § 310.4.

The Commission amends renumbered § 310.6(b)(4),[904] which exempts inbound calls that are not a result of a solicitation, to make this exemption unavailable to upsell transactions and to calls in response to a message left pursuant to the abandoned call safe harbor provision in § 310.4(b)(4)(iii).

The Commission amends the general media exemption, now renumbered § 310.6(b)(5),[905] and the direct mail exemption, now renumbered § 310.6(b)(6),[906] to make these exemptions unavailable to upsells, and to telemarketers of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule. In addition, the amended Rule makes clear that email and facsimile messages are direct mail for purposes of the Rule. Finally, the amended Rule modifies the proposed business-to-business exemption, now at § 310.6(b)(7)[907] to clarify that

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[903] These exemptions were found at § § 310.6(a), (b), and (c) of the original Rule.

[904] This provision was § 310.6(d) in the original Rule.

[905] The general media exemption was at § 310.6(e) in the original Rule.

[906] The direct mail exemption was at § 310.6(f) in the original Rule.

[907] The business-to-business exemption was at § 310.6(g) in the original Rule.

sellers and telemarketers of nondurable office or cleaning supplies need not comply with the amended Rule's "do-not-call" provisions.

In addition, the amended Rule removes the proposal that would have made the business-to-business exemption unavailable to the telemarketing of Web services, Internet services, and charitable solicitations to businesses. Pursuant to the USA PATRIOT Act amendments to the Telemarketing Act, the Commission amends the Rule to expand several of the exemptions to encompass calls to induce charitable solicitations. Thus, the amended Rule exempts: charitable solicitation calls that are followed by face-to-face payment, § 310.6(b)(3); prospective donors' inbound calls not prompted by a solicitation, § 310.6(b)(4); charitable solicitation calls placed in response to general media advertising, § 310.6(b)(5); and donors' inbound calls placed in response to direct mail solicitations that comply with § 310.4(e). In the NPRM, the Commission proposed to make the business-to-business exemption unavailable for charitable solicitation calls. Based upon the record in this proceeding, the Commission has determined that it should not proceed with this proposal.

§§ 310.6(b)(1), (2), and (3)—Exemptions for pay-per-call services, franchising, and face-to-face transactions

Section 310.6(a) of the original Rule exempts all transactions subject to the Commission's Pay-Per-Call Rule.[908] Similarly, § 310.6(b) exempts transactions subject to the Commission's Franchise Rule.[909] Section 310.6(c) exempts transactions in which the sale of goods or services is not completed, and payment or authorization of payment is not

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[908] The renumbered exemption in the amended Rule is found at § 310.6(b)(1).

[909] The renumbered exemption in the amended Rule is found at § 310.6(b)(2).

required, until after a face-to-face sales presentation by the seller.[910] In the NPRM, the Commission proposed to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions,[911] and require telemarketers selling these exempted goods and services to comply with § 310.4(a)(1) (prohibiting threats, intimidation, or use of profane or obscene language), § 310.4(a)(7) (requiring transmission of Caller ID), § 310.4(b) (prohibiting abusive pattern of calls and requiring compliance with "do-not-call" provisions), and § 310.4(c) (calling time restrictions).

The NPRM pointed out that the Rule Review record contained ample evidence of consumers' increasing frustration with unwanted telemarketing calls, including those soliciting for pay-per-call services or sales appointments.[912] A number of participants in the Rule Review Forum concurred that the "do-not-call" provision of the Rule should also be applicable to calls where a seller attempts to set up an in-

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[910] Face-to-face transactions are also covered by the Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429. This exemption has been renumbered in the amended Rule and is now found at § 310.6(b)(3).

[911] No modifications to § § 310.6(b)(1) and (2) are necessary to implement the USA PATRIOT Act amendments because charitable solicitations are not likely to be combined with pay-per-call or franchise sales. Therefore, there is no need to expressly exempt such an unlikely scenario from TSR coverage. However, it is necessary to amend [§ 310.6(b)(3) to exempt charitable solicitations that entail a face-to-face meeting before the donor pays.

[912] 67 FR at 4516-18. One consumer who spoke during the public participation portion of the DNC Forum noted frustration about her inability to invoke her right not to be called again by a company that called her to solicit a sales appointment. *See generally* DNC Tr. at 241-46 (Mey). *See also FTC v. Access Resource Servs.*, No. 02-60226 CIV GOLD (S.D. Fla. filed Feb. 13, 2002) (regarding Miss Cleo's psychic services where psychics continued to call consumers despite repeated requests from the consumer to stop calling).

person sales meeting at a later date.[913] For these reasons, the Commission proposed making face-to-face, franchise, and pay-per-call transactions subject to the "do-not-call," calling time restriction, and certain other abusive practices provisions in § 310.4.

Consumer and privacy advocates, as well as state regulators, supported the Commission's proposal to make these transactions subject to the "do-not-call" and certain other provisions of § 310.4.[914] They recommended that, in order to be effective, a "do-not-call" registry should have as few exemptions as possible. PRC pointed out:

> [T]elemarketing as a business practice transcends the boundaries of regulated and unregulated industries. So-called "cold calling" is a common marketing technique, used by the most established regulated entity down to the fraudulent "boiler room" that is here today and gone tomorrow.
>
> Each type of entity—and all those in between that make unwanted telephone calls to a private home—contribute to privacy invasions, costs for devices to stop the invasions, and the overall annoyance factor voiced so strongly by the public. For this reason, telemarketing abuses can only be curtailed if the practice itself—rather than the type of business involved—is subject to the Commission's rules.[915]

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[913] *See* RR Tr. at 291-96.

[914] EPIC-NPRM at 20; PRC-NPRM at 3-4 (there should be no exemptions whatsoever from "do-not-call" registry); FCA-NPRM at 1-2 (intrastate calls should not be exempt); NAAG-NPRM at 57; NFDA-NPRM at 5 (in connection with the face-to-face transaction exemption, telemarketers should also be required to comply with the oral disclosure requirements of § 310.4(d)).

[915] PRC-NPRM at 3-4.

The Commission received no comments opposing application of the "do-not-call" and other abusive practices provisions to pay-per-call transactions. With regard to transactions subject to the Commission's Franchise Rule, industry commenters expressed concern about ambiguities on how the "do-not-call" and calling time restrictions would be applied when inbound calls are converted to outbound calls.[916] The Commission has addressed this issue in its discussions above of the definition of "outbound call" and required disclosures in upsell transactions. IFA also noted that compliance with a national "do-not-call" registry would be costly, particularly if the registry does not contain an exemption for established business relationships and does not preempt state "do-not-call" laws.[917] The Commission has addressed these issues in its discussion above regarding the national "do-not-call" registry.

Face-to-face transactions: Industry commenters generally opposed making face-to-face transactions subject to the "do-not-call," calling time restriction, and certain other abusive practices provisions.[918] These commenters argued that face-to-face transactions should continue to be exempt because their practices are already heavily regulated by the states and by the Commission through other FTC rules and thus are less susceptible to abusive practices.[919] However, the national

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[916] Car Wash Guys-NPRM at 51-56; IFA-NPRM at 2; NFC-NPRM at 3.

[917] IFA-NPRM at 2.

[918] *See generally* Craftmatic-NPRM; DSA-NPRM; NAR-NPRM; ICFA-NPRM at 2-3; Insight-NPRM. *See also* June 2002 Tr. III at 157-226. *But see* ARDA-NPRM at 2, 7-9, which supports creation of a national "do-not-call" registry as long as the registry preempts state laws and the Commission provides an exemption for established business relationships.

[919] *See, e.g.* DSA-NPRM at 6-7; NAR-NPRM at 4; June 2002 Tr. III 157-226.

"do-not-call" registry is not focused on fraud, but rather on consumer privacy. The Commission agrees that the incidence of fraud may be diminished in face-to-face transactions, where the transactions are subject to regulation by other Commission rules or by state regulations. For that reason, the Commission has retained the exemption for face-to-face transactions from the provisions of the Rule that address deceptive or other abusive practices. However, the commenters failed to provide arguments showing why they should be exempted from regulations covering the particular abusive practices set forth in the Commission's proposal—*i.e.*, a national "do-not-call" registry, calling time restrictions, the prohibition against denying or interfering with a consumer's right to be placed on a "do-not-call" list, the requirement to transmit Caller ID information, and the prohibition against threats and intimidation.

NAR argued that Congress intended the TSR to address abusive, deceptive, and fraudulent telemarketing practices, not to regulate or prohibit a single telephone call from a real estate professional that simply provides information to a consumer.[920] Transactions subject to the Commission's amended Rule (and thus subject to the national "do-not-call" registry) are those that fall within the definition of "telemarketing," *i.e.*, "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and

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[920] NAR-NPRM at 1-2. Similarly, DSA notes that many of the calls by direct sellers involve single telephone calls to individuals with whom the seller has a personal relationship. DSA maintains that calls to individuals with whom an on-going commercial or personal relationship exists are reasonable, frequently welcome, and expected by the consumer, and therefore suggests that the Commission provide an exemption for a prior business or personal relationship. DSA-NPRM at 5-8. As discussed above in the section regarding the national "do-not-call" registry, the amended Rule provides an exemption for "established business relationships."

which involves more than one interstate telephone call."[921] A single, isolated telephone call would not be part of a plan, program, or campaign and thus would not fall within the definition of "telemarketing." Furthermore, it is unlikely that the majority of real estate agents conduct campaigns of outbound calls to solicit potential customers who live out-of-state. Most of the outbound solicitation calls made by real estate agents are probably intrastate calls that would be excluded from the Rule's coverage. However, if a real estate agent routinely places outbound calls to solicit potential customers in other states, those calls, in the aggregate, would fall within the definition of "a plan, pattern, or campaign" of outbound calls and would be subject to the Rule.

NAR also argued that a call to set up a meeting does not fall within the definition of "telemarketing" because such calls do not involve the inducement to purchase using the telephone, but rather non-deceptive communication of information about services that are not offered or made available for purchase in a phone conversation.[922] However, the definition of "telemarketing" does not require that the purchase be made during the telephone conversation. The definition simply states that the call be "conducted to induce the purchase of goods or services." The inducement could be made during the telephone call, or it could be in the form of setting up a subsequent face-to-face meeting at which an additional sales presentation could take place.

In summary, the Telemarketing Act mandates that the Commission's Rule address abusive telemarketing practices and specifically mandates that the Commission's Rule include a prohibition on calls that a reasonable consumer would consider coercive or abusive of the consumer's right to

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[921] Amended Rule § 310.2(cc).

[922] NAR-NPRM at 3-4. *See also* ICFA-NPRM at 1-2 (regarding funeral goods and services).

privacy, as well as restrictions on calling times.[923] The rulemaking record shows that face-to-face transactions are not less susceptible to certain abusive practices prohibited in § 310.4.[924] For this reason, the Commission has determined that telemarketing calls to solicit a face-to-face presentation or the purchase of pay-per-call services should be subject to certain Rule provisions designed to limit abusive practices. Because franchise sales generally involve a face-to-face meeting at some point, these transactions are simply another type of face-to-face transaction and thus the telemarketing of franchises should be held to the same standard.

Therefore, the Commission retains the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in § § 310.6(b)(1)-(3), but amends the TSR to require that telemarketers making these types of calls comply with §§ 310.4(a)(1) and (7), and § § 310.4(b) and (c). The amended Rule continues to exempt such calls from the requirements of § 310.3 relating to deceptive practices and from the recordkeeping requirements set out in § 310.5.[925] These calls would also continue to be exempt from providing the oral disclosures required by § 310.4(d). Similarly, telemarketers soliciting charitable donations would be exempt from § 310.4(e) when the payment or donation is made subsequently in a face-to-face setting. However, the amended Rule requires that, even when a call falls within these exemptions, a telemarketer may not engage in the following practices:

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[923] 15 U.S.C. 6102(a)(1) and (3)(A)-(B).

[924] *See* Gindin-RR at 1; Mey-RR *generally*; DNC Tr. at 241-46; RR Tr. at 291-95.

[925] Of course, a seller or telemarketer would have to keep documentation in order to successfully raise the "safe harbor" defense in § 310.4(b)(3) regarding compliance with the amended Rule's "do-not-call" requirements. The safe harbor relating to abandoned calls, discussed in § 310.4(b)(4), also includes a requirement to maintain certain records.

- threatening or intimidating a customer, or using obscene language;
- failing to transmit Caller ID information;
- causing any telephone to ring or engaging a person in conversation with intent to annoy, abuse, or harass the person called;
- denying or interfering with a persons's right to be placed on a "do-not-call" registry;
- calling persons whose telephone numbers have been placed on the national "do-not-call" registry maintained by the Commission, unless an established business relationship exists between the seller and the person (telemarketers seeking charitable solicitations are exempted from this requirement);
- calling persons who have placed their names on that seller's or charitable organization's "do-not-call" list; and
- calling outside the time periods allowed by the Rule.

§ 310.6(b)(4)—Inbound calls not in response to a solicitation

The amended Rule revises § 310.6(b)(4) to expressly except from the exemption any upsell following an exempt transaction initiated by the consumer. When the Commission issued the original Rule in 1995, this exemption was intended to apply to a single telemarketing transaction initiated by the consumer without any solicitation by the seller or telemarketer. Since then, the practice of upselling has emerged, and has grown dramatically, particularly in the inbound telemarketing context. The reasons for exempting a telemarketing transaction pursuant to § 310.6(b)(4) do not apply to an upsell linked to that initial transaction.

Section 310.6(b)(4) of the amended Rule exempts calls initiated by consumers without solicitation by the seller or

telemarketer because such calls are not part of a "plan, program, or campaign to induce the purchase of goods or services."[926] Thus, these calls do not fall within the definition of "telemarketing." The exemption was intended to cover

> incidental uses of the telephone that are not in response to a direct solicitation, *e.g.*, calls from a customer to make hotel, airline, car rental, or similar reservations, to place carry-out or restaurant delivery orders, or to obtain information or customer technical support.[927]

Furthermore, in these calls, the consumer presumably is in control of the transaction that the consumer initiated, absent any outbound call or direct mail piece.

In contrast, the upsell is a direct solicitation for a product or service other than that for which the consumer initiated the call. As such, upsells *are* part of a telemarketing "plan, program, or campaign to induce the purchase of goods or services" and thus *do* fall within the definition of "telemarketing." Furthermore, in upsells, the consumer does not initiate the sales transaction; the sales solicitation is initiated by the seller. When the consumer initiates an unsolicited inbound call, the consumer does not necessarily expect to be offered a good or service during the course of that call (such as in the case of a technical support call), or to be offered additional goods or services (in the case where the consumer was calling to make a purchase). Some commenters suggested that upsells appended to inbound calls should be exempted.[928] However, the Commission's experience indicates that upsells appended to unsolicited inbound calls open the door to potential deception and abuse in the subsequent

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[926] *See* S. REP. NO. 103-80, at 8 (1993).

[927] 60 FR at 43860.

[928] *See, e.g.*, AFSA-NPRM at 15.

upsell transaction.[929] Accordingly, the amended Rule excepts upsell transactions from the exemption provided for unsolicited inbound calls by consumers in § 310.6(b)(4).

There was substantial comment on the potential cost of subjecting upsells associated with inbound calls to any provisions beyond the Rule's disclosure requirements.[930] The original Rule exempted most inbound calls entirely, since most would fall within either this exemption for calls initiated by the consumer, or into renumbered § § 310.4(b)(5) or (6) for general media advertisements or certain direct mail solicitations—each of which is discussed below. As a result, sellers and telemarketers were not required to comply with the Rule's recordkeeping requirements with respect to these exempt telephone calls. While the amended Rule retains these exemptions (although with some modification), upsell transactions are excluded from those exemptions. Thus, to the extent that the Rule requires that records be maintained, including recordings of express verifiable authorization or express informed consent, such records must be maintained regarding these inbound upsells.

Commenters expressed concern primarily about the potential need for sellers and telemarketers to record certain

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[929] Indeed, NAAG noted that the states' law enforcement experience revealed that upsells often proved problematic when appended to inbound calls initiated by the consumer, or by general media advertisements. NAAG-NPRM at 33 ("[Upsells] are usually inbound calls during which the company receiving the call completes the purpose for which the consumer initiated the call and then entices the consumer to consider another seller's products. The upsell can follow either a sales call or a call related to customer service such as a call about an account payment or product repair.") *See, e.g., New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance).

[930] *See, e.g.*, DMA-NPRM at 38; ERA-NPRM at 11; PMA-NPRM at 9-13.

inbound transactions.[931] These commenters suggested that call centers accustomed to handling only inbound telemarketing calls were not necessarily equipped with recording equipment, and that obtaining and implementing the necessary systems would be prohibitively expensive for many such organizations.[932] However, the Commission notes that taping is required only in one circumstance: under new § 310.4(a)(6)(i)(C), the seller or telemarketer must make and maintain a recording of the entire sales transaction any time a telemarketing transaction involves both preacquired account information and a "free-to-pay conversion" feature.[933] In instances where it is necessary to obtain the consumer's express verifiable authorization pursuant to § 310.3(a)(3), the amended Rule provides alternatives to making a recording of the consumer's oral authorization.[934] Thus, the number of industry members who would be required to obtain recording equipment is relatively limited. Moreover, with the growth of digital recording technology, the capital investment in recording equipment and record storage is rapidly declining.[935]

CCC argued that in inbound calls not currently subject to the Rule, the impact of these amendments would be to "unnecessarily increase inbound call length by 50 percent or more and thereby increase the cost of goods or services to consumers."[936] CCC also suggested that additional record-keeping, "public disclosure," and taping requirements will be

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[931] CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); June 2002 Tr. II at 232-33 (MPA).

[932] CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); MPA-NPRM at 28-29; June 2002 Tr. II at 232-33 (MPA).

[933] *See* discussion of § § 310.2(o) and (w), and § 310.4(a)(6) above for a detailed explanation of these provisions.

[934] *See* discussion of § 310.3(a)(3) above.

[935] *See* note 480 above.

[936] CCC-NPRM at 16.

overly burdensome.[937] While the Commission recognizes that, to the extent telemarketers have not been subject to the Rule, there is potential for additional burdens, the obligations of the Rule are minimal, and generally reflect regular practices already in place for most sellers and telemarketers in the ordinary course of business—such as the basic disclosure requirements, prohibition on misrepresentations, and recordkeeping requirements.[938] Moreover, the taping requirement is limited to those transactions that involve both preacquired account information and a "free-to-pay conversion" offer. Thus, only those sellers and telemarketers that choose to structure their upselling campaigns in this fashion will be subject to this additional requirement. The Commission therefore believes that any additional burden caused by these new requirements will be minimal. Ultimately, the Commission believes that the benefits to consumers of receiving the appropriate disclosures in an upsell transaction outweigh the costs to industry of providing those disclosures and ensuring that any charges are authorized by the consumer.

Additionally, it should be clear that telephone calls initiated by a customer or donor in response to a telemarketer's transmission of Caller ID information or use of a recorded message under the abandoned call safe harbor provision described in § 310.4(b)(4) are excepted from this exemption, as the customer or donor in this context would have had no reason to initiate a telephone call but for the solicitation efforts of the seller, charitable organization, or telemarketer. The transmission of Caller ID information and the use of a recorded message are considered forms of solicitation by a seller, charitable organization, or telemarketer under this exemption because they are part of a telemarketer's efforts to

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[937] *Id.*

[938] 60 FR at 32682-83 (June 23, 1995).

induce the purchase of goods or services or a charitable contribution. Although the information displayed on a consumer's caller identification service or provided via a recorded message will not include a sales pitch, it is a "result of [a] solicitation" and therefore outside the scope of the exemption described in this section.

310.6(b)(5)—Exemption for general media advertisements

The Commission received few comments addressing its proposal to narrow the general media exemption by adding two additional categories of goods or services to the list of its exceptions: credit card loss protection plans, and business opportunities other than those covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate.[939] The proposed expansion of the exemption to cover charitable solicitations pursuant to the USA PATRIOT Act yielded no comments.

Several of the commenters who addressed the general media exemption opposed having any exemption at all for general media, and therefore supported any effort to narrow it.[940] NCL stated that if the Commission determined to retain the general media exemption it supported the addition of credit card loss protection plans and business opportunities other than those covered by the Franchise Rule to the list of goods and services excepted from the exemption. In support of its position, NCL noted that in 35 percent of the work-at-home complaints made to the NFIC in the year 2001, consumers reported that they were solicited through print media.[941] Since work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception

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[939] This section was found at § 310.6(e) in the proposed Rule.

[940] *See, e.g.*, EPIC-NPRM at 25-26; NCL-NPRM at 12; NAAG-NPRM at 58; June 2002 Tr. III at 177, 182-83 (NAAG has historically opposed the exemption; AARP supports NAAG position).

[941] NCL-NPRM at 12.

from the general media exemption will now ensure that inbound calls in response to general media advertisements touting work-at-home opportunities will be subject to the Rule. NCL also noted that although most of the solicitations for credit card loss protection plans were made by telephone, these services should be covered by the Rule regardless of how they are promoted "given the egregious nature of these complaints."[942]

While commenters and forum participants generally endorsed the proposed narrowing of the general media exemption, some urged the Commission to reconsider whether a general media exemption is "appropriate and workable," arguing that consumers who call in response to such advertisements are vulnerable to fraud and deception unless certain minimal disclosures are made.[943] NCL acknowledged that the Commission could combat such deception using its authority under Section 5 of the FTC Act, but argued that consumer injury could better be prevented if disclosures were required. NCL further advanced the proposition that all telemarketers should be subject to the express verifiable authorization requirements when consumers' accounts will be billed, regardless of whether calls are outbound or inbound, and, in the latter instance, even when such calls are in response to an advertisement delivered by general media or direct mail.[944] EPIC noted its position that "[g]eneral media advertising may be deceptive, abusive or merely lack the information required to be disclosed under the Rule, thus substantially reducing the level of protection otherwise afforded to consumers by the Rule."[945]

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[942] *Id.*

[943] *Id. See also* June 2002 Tr. III at 177-83 (NAAG and AARP).

[944] NCL-NPRM at 12.

[945] EPIC-NPRM at 25-26.

The Commission declines to adopt these recommendations to further regulate inbound calls resulting from general media advertisements. In the SBP issued with the original Rule, the Commission explained that in its experience "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."[946] The Commission's experience since the promulgation of the Rule continues to support the exemption for general media advertising, with targeted exceptions for certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls. In response to the suggestion that express verifiable authorization be required in all telemarketing transactions when the consumer's account will be billed, the Commission notes that the parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3).[947]

NAAG expressed concern about the growing number of sellers of membership or buying club opportunities that operate using an "upsell" technique after an initial inbound call is placed by consumers in response to an advertisement for a completely different product.[948] NAAG suggested that the Commission amend the general media exemption to ensure that the Rule does not inadvertently exempt upselling transactions that occur when a consumer calls a seller or telemarketer in response to a general media advertisement.[949]

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[946] 60 FR at 43860.

[947] The Commission also notes that new § 310.4(a)(6) requires that, in every instance, a seller or telemarketer secure the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account.

[948] NAAG-NPRM at 58-59.

[949] *Id. See also* EPIC-NPRM at 25 (agreeing that upselling calls should be subject to the Rule). *Cf.* Capital One-NPRM at 5 (requesting clarification that upselling calls are exempt, at least in an internal upsell).

The Commission agrees that this scenario would be an unwelcome consequence of the provision's wording and thus has amended this provision to clarify that the exemption may not be claimed in any instances of upselling that occur in the call.

NAAG also recommended that the list of exceptions to the general media exemption be expanded to include other transactions that involve a high risk of abuse, such as discount buyers clubs and offers involving "opt out free trials."[950] The Commission agrees that the telemarketing of these products or services frequently involves fraudulent or deceptive practices. However, there is no evidence on the record indicating that these products or services are telemarketed through general media advertisements. Rather, the states and the Commission have brought law enforcement actions challenging the deceptive telemarketing of these products predominantly when they are sold via outbound cold calls or in upselling, after the consumer has called to purchase another product or service in response to a general media advertisement.[951] As discussed above, the amended Rule contains a modified general media exemption, which makes the exemption unavailable to upselling transactions that occur in a call in response to a general media advertisement. In addition, the amended Rule contains specific requirements for negative option, "free-to-pay conversion," and upselling

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[950] NAAG-NPRM at 59.

[951] *See, e.g., FTC v. Smolev.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, No C8-99-10638, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997).

transactions.[952] Therefore, the Commission finds it unnecessary to except discount buyers clubs and offers involving "opt out free trials" from the general media exemption.

DSA opposed the amendment of the general media exemption provision, expressing the concern that the exception for "business opportunities other than business arrangements covered by the Franchise Rule" will require individual direct sellers to comply with the Rule when they solicit customers or salespeople through general media advertisements.[953] DSA argues that "[t]here is nothing inherently deceptive or abusive about communications over the telephone (particularly those initiated by the consumer) regarding a business opportunity" and that "there should be even fewer concerns about communications related to prospective transactions involving activities clearly deemed de minimis by the Franchise Rule."[954] As the Commission stated in the NPRM, it has determined, based on the record and in particular on its extensive law enforcement experience in this area, that "telemarketing fraud perpetrated by the advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon."[955] Outbound telephone calls to induce the purchase of a business opportunity not regulated by the Franchise Rule have been subject to the Rule's coverage since it was promulgated, and the new exception for general media advertisements merely expands that requirement when an inbound call results from

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[952] *See* amended Rule § § 310.3(a)(1)(vii), 310.3(a)(2)(ix), 310.3(a)(3)(iii), 310.4(a)(6), 310.4(a)(7), and 310.4(d).

[953] DSA-NPRM at 8-9.

[954] *Id.*

[955] 67 FR at 4530-31 (this determination is equally applicable to the advertisement by direct mail of business opportunities other than business arrangements covered by the Franchise Rule).

the advertisement of such ventures in the general media.[956] Moreover, if a direct seller is marketing its underlying product to customers, the exception would not bring such activity under the Rule because it would not implicate the sale of a business opportunity.[957] Furthermore, as the Commission noted in the SBP for the original Rule, DSA's concern about recruitment of persons to engage in the direct sale of goods or services is likely unfounded because the face-to-face exemption takes such efforts outside the Rule's coverage.[958]

Based on its review of the record in this matter, and its law enforcement experience, the Commission has determined to retain the proposed general media provision in the amended Rule with two changes. First, the phrase "or any subsequent rule covering business opportunities the Commission may promulgate" has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time. Second, § 310.6(b)(5) has also been amended to expressly except from the general media exemption any upsell following the exempt transaction associated with the general media solicitation. As with telephone calls initiated by the consumer without any solicitation by the

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[956] The Commission noted in the original SBP that "[w]hen a business venture is not covered by the Franchise Rule, then consumers do not receive the protection afforded by that Rule's pre-sale disclosure requirements. Therefore, it is appropriate that telephone sales of such ventures should be covered by this Rule, so that consumers may receive the benefit of its protections." 60 FR at 4360. The addition of the exception provisions to the direct mail and general media exemptions merely expands upon the initial requirement.

[957] For example, the exception to the general media exemption would bring under the Rule an effort by a direct seller to recruit others to market its products, but not the sale by the direct seller of cosmetics to its own end-customers.

[958] 60 FR at 43860, n.185.

seller or telemarketer, the reasons for exempting a telemarketing transaction following certain general media solicitations do not apply to an upsell linked to that initial transaction.[959] The original Rule exempts calls in response to a general media advertisement because "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."[960] However, the Commission recognized that some fraudulent telemarketers and sellers have used general media advertisements to entice victims to call, and thus has excepted those problem areas from the exemption. Upselling is one of the problem areas where general media advertisements have provided the opening for subsequent deception and abuse.[961] In addition, an upsell transaction is not similar to a general media advertisement. It is a wholly new sales offer targeted at the consumer a seller or telemarketer has on the line for some other purpose, whether it be in response to a general media advertisement about a different product or service, or a customer service call initiated by the consumer. Accordingly, the amended Rule excepts upsell transactions from the general media exemption in § 310.6(b)(5).

§ 310.6(b)(6)—Exemption for direct mail solicitations

Section 310.6(b)(6) of the original Rule exempts from the Rule's requirements inbound telephone calls resulting from a direct mail solicitation that clearly, conspicuously, and truthfully disclosed all material information required by § 310.3(a)(1). Certain categories of transactions, specifically

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[959] The reasons for this exception are explained in greater detail in the discussion of amended Rule § 310.6(b)(4) above.

[960] 60 FR at 43860.

[961] *FTC v. Smolev* (a/k/a Triad Discount Buying Service) is one example of an internal upsell triggered by consumer response to a general media advertisement. *Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). *New York v. Ticketmaster* (Settlement announced on Jan. 7, 2002).

those in which the solicitation was for a prize promotion, investment opportunity, credit repair service, "recovery" service, or advance fee loan, were excepted from this exemption because the record and the Commission's law enforcement experience made clear that these particular products and services were so often subject to abuse by fraudulent telemarketers that regulation under the TSR was appropriate.

The proposed Rule retained the direct mail exemption provision, but clarified that advertisements sent via facsimile or electronic mail were considered direct mail for purposes of this exemption.[962] The proposed Rule also added two new categories of transactions to be excepted from the direct mail exemption: credit card loss protection plans and business opportunities other than those covered by the Franchise Rule or any subsequent Rule covering business opportunities the Commission may promulgate. Finally, pursuant to the USA PATRIOT Act, the proposed Rule expanded the exemption to exclude from the Rule's coverage inbound calls to solicit a charitable contribution made in response to a direct mail solicitation that complies with § 310.3(a)(1).

The Commission has determined, based on a review of the record and its own law enforcement experience, to adopt the proposed amendments to the direct mail exemption, renumbered in the amended Rule as § 310.6(b)(6). The amended Rule, however, differentiates between the requirements for direct mail solicitations for goods or services and direct mail solicitations for charitable contributions. The amended Rule retains unchanged the requirements of the original Rule—*i.e.*, the direct mail solicitation must clearly, conspicuously, and truthfully disclose all material information required by § 310.3(a)(1). However, because § 310.3(a)(1) applies only to goods and services and not to charitable solicitations, the

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[962] The direct mail exemption provision is found in the proposed Rule at § 310.6(f).

amended Rule modifies the direct mail exemption language to ensure that prospective donors who receive direct mail solicitations for charitable contributions have protections similar to those enjoyed by consumers who purchase goods or services. Thus, the amended Rule adds language to the direct mail exemption provision prohibiting material misrepresentations regarding any item contained in § 310.3(d) in charitable solicitations sent by direct mail to donors.

In the proposed Rule, the Commission stated that the direct mail exemption would be applicable to inbound calls made in response to a direct mail charitable solicitation that complies with § 310.3(a)(1). NAAG suggested that inbound calls resulting from a direct mail charitable solicitation be exempt instead if the direct mail piece clearly, conspicuously, and truthfully sets forth the disclosure in § 310.4(e)(1) (the identity of the charitable organization) and the fact that the organization is soliciting a charitable contribution.[963] NAAG further recommended that, at a minimum, several categories of information (including the nature of the goods or services and the facts relating to a charitable contribution) deemed important to consumers and donors be expressly referenced in § 310.6(f).[964] The Commission agrees that the specific disclosures required by § 310.3(a)(1)—targeted at the sale of goods or services—are an imperfect fit with the type of information a potential donor would need to determine if he or she wished to contact a charitable organization in response to a solicitation received via direct mail. Therefore, the amended Rule requires that, in order for the telemarketer to take advantage of the direct mail exemption for inbound calls in response to any direct mail charitable solicitation, such solicitation contain no material misrepresentation regarding any item contained in § 310.3(d) of the Rule.

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[963] NAAG-NPRM at 59-60.

[964] *Id.*

Section 310.6(b)(6) has also been amended to expressly except from the direct mail exemption any upsell following the exempt transaction associated with the direct mail advertisement. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, or in response to general media solicitations, the reasons for exempting a telemarketing transaction triggered by a direct mail advertisement do not apply to an upsell linked to that initial transaction.[965] Section 310.6(b)(6) of the amended Rule exempts direct mail solicitations only if the disclosures required by § 310.3(a)(1) are truthfully, clearly, and conspicuously provided in the direct mail piece. The Commission exempted these direct mail solicitations because such solicitations

> are not uniformly related to the forms of deception and abuse the Act seeks to stem, nor are they uniformly related to such misconduct. Rather, in certain discrete areas of telemarketing, such solicitations often provide the opening for subsequent deception and abuse. The Commission has drawn upon its enforcement experience, identified those problem areas, and excluded them from this exemption.[966]

Upselling transactions are one of the problem areas where direct mail solicitations have provided the opening for subsequent deception and abuse.[967] Upon receiving a direct mail solicitation in which all of the material terms of the offer

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[965] The reasons for this exception are discussed in greater detail in the explanation of §§ 310.6(b)(4) and (5) above. Capital One requested clarification of the applicability of this exemption to upselling transactions. Capital One-NPRM at 5-6. EPIC requested that upselling be subject to the Rule. EPIC-NPRM at 25.

[966] 60 FR at 43860.

[967] *See, e.g., United States v. Prochnow*, No. 1 02-cv-917 (N.D. Ga. 2002).

may be available to evaluate in the direct mail piece, the consumer has the time and the information necessary to make an informed decision whether to call and inquire further or make a purchase. By contrast, an upsell presentation provides the consumer no opportunity to review the material disclosures pertinent to the offer. Once again, the upsell is more akin to an unsolicited outbound call to the consumer, who does not necessarily expect to be solicited for a purchase, and who has none of the material information he or she needs to evaluate the offer and make a purchasing decision. Accordingly, the amended Rule excepts upselling transactions from the direct mail exemption in § 310.6(b)(6).

Finally, the phrase "or any subsequent rule covering business opportunities the Commission may promulgate" has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time.

Facsimile and electronic mail solicitations as "direct mail": NCL and ARDA supported the Commission's view that facsimile and electronic mail solicitations are analogous to direct mail sent via the U.S. Postal Service, and should be considered direct mail for purposes of the exemption.[968] NCL noted that facsimile ("fax") or electronic mail ("email") solicitations are often sent to promote fraudulent goods or services.[969] For example, in "Nigerian money offer" schemes, the fastest growing category of telemarketing fraud reported to NCL, faxes and emails are the primary methods of solicitation.[970] NCL noted that faxes and email are also used

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[968] *See* ARDA-NPRM at 17; NCL-NPRM at 12.

[969] *See* NCL-NPRM at 12.

[970] *Id.*

to solicit businesses for a variety of telemarketing scams.[971] DMA also supported the interpretation that advertisements sent via fax or email should be considered as "direct mail" pieces for purposes of the Rule.[972]

Some commenters opposed the inclusion of fax and email advertisements in the exemption,[973] and some expressed concern that the Commission's interpretation could actually increase the number of unwanted solicitations sent to consumers by fax and email.[974] NCL stated that unsolicited fax advertisements were prohibited under the TCPA because of their intrusive impact on recipients' privacy, and expressed concern that exempting calls in response to unsolicited faxes from the Rule, even if the information in them is accurate and complete, "would ignore this important public policy determination."[975] NCL recommended that the Commission ban the sending of unsolicited fax advertisements as an abusive practice under the Rule.[976]

The record in this matter provides no support for the assertion that the number of unwanted, but truthful, fax and email solicitations may increase as a result of being exempted from the TSR. The Commission notes that the TCPA, enforced by the FCC, already bans unsolicited fax messages.[977] The FCC has promulgated rules effectuating the

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[971] *Id.*

[972] *See* DMA-NPRM at 56.

[973] *See, e.g.*, EPIC-NPRM at 26.

[974] *See, e.g.*, CNO-NPRM at 6; NCL-NPRM at 12.

[975] *See* NCL-NPRM at 12-13.

[976] NCL-NPRM at 13.

[977] 47 U.S.C. 227(b). In its recent Notice of Proposed Rulemaking, the FCC noted that complaints about unsolicited faxes have been steadily increasing, from 519 in 1996 to over 2100 in 2000. FCC TCPA 2002 (see note 633 above), at para. 8. There is no suggestion in the FCC's NPRM that a spike in the actual number of unsolicited faxes has occurred or that

Congressional ban and has enforced those regulations.[978] Thus, the Commission's determination that, for the purposes of the TSR, faxes and email are forms of "direct mail" should have no impact on the number of unsolicited faxes that are sent. To presume such would be to anticipate that sellers would blatantly ignore the FCC's regulations. To be entirely clear, however, the Commission wishes to state that its interpretation of the term "direct mail" in no way alters the legality of the underlying direct mail contact. Rather, the new TSR provision will require that, to the extent that a fax or email solicitation is allowed by law, these direct mail solicitations must include the required disclosures, or else resulting inbound calls from consumers will be subject to the entire TSR.[979]

Although it favored the Commission's proposed interpretation which viewed faxes and email as "direct mail" for purposes of the Rule, DMA argued that the Rule should allow the disclosures of material information to be made in the telephone call, rather than in the fax or email advertisement.[980] As support for its position, DMA stated that to do otherwise could result in increased expense to sellers who use

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any increase is attributable to the FTC's determination that faxes and email are forms of direct mail for purposes of the TSR.

[978] 47 CFR 64.1200(a)(3). *See also* FCC Press Release: "FCC Cracks Down on 'Junk Fax' Violations," http://www.fcc.gov/cgb/news/080802.junkfax.html; FCC's 2002 NPRM at para. 7, n.40.

[979] If the fax or email advertisement is sent in violation of state or other federal law, the sender would be liable under those federal or state laws, but not under the TSR, unless the fax or email also failed to include the requisite disclosures and the seller or telemarketer, in any subsequent telemarketing effort, failed to abide by the Rule.

[980] DMA-NPRM at 58 ("The types of disclosures proposed by the Commission are worthwhile, so long as they can be provided over the phone by the telemarketer."). *See also* Associations-NPRM at 4; Associations-Supp. at 8.

email to reach their target audience, due to the increased length of the message. DMA further argued that the Commission lacks authority to dictate the content of either email or fax advertisements. Finally, DMA posited that, if the intent of the provision is to mandate disclosures, the NPRM failed to evaluate the costs of requiring such disclosures, particularly in email solicitations.[981]

The Commission believes that, to warrant exemption of the inbound call in response to a direct mail solicitation from the Rule, it is critical that a consumer receive the required disclosures (or, in the case of a charitable solicitation, that the solicitation not contain misrepresentations) at the time the consumer contemplates contacting the seller or charitable organization by telephone. The amended Rule follows the reasoning of the original Rule, which requires that any direct mail solicitation contain the required disclosures in order to afford the consumer an opportunity to know certain material information before determining whether to call the telemarketer. Apart from DMA's comment, the Commission finds no record evidence to support alteration of this requirement simply because the direct mail solicitations are sent by email rather than the U.S. Postal Service. It is not the intent of the Commission to use this provision to require new disclosures surreptitiously; indeed, the disclosures required (and misrepresentations prohibited, in the case of a charitable solicitation) are merely those that a telemarketer must make in the course of any non-exempt telemarketing transaction.

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[981] In their supplemental comment, Associations, of which DMA is a member, noted only that inclusion of the required disclosures in an email or fax "imposes significant costs on businesses. Particularly on email communications, 'real estate' and location have significant financial value." Associations-Supp. at 8. This mere assertion remains all that exists on the record regarding the cost of requiring the § 310.3(a)(1) disclosures in an email or fax, and the Commission finds this insufficient to cause it to reconsider its position based on the financial harm argument asserted by Associations.

Sellers remain free to choose the most advantageous method by which to contact consumers, and those opting for direct mail solicitations sent by email must determine whether the costs of making the relevant disclosures[982] are offset by the savings attained by being exempt from the rest of the Rule.

Exceptions to the direct mail exemption: Commenters were generally supportive of the Commission's proposal to narrow the direct mail exemption to make it unavailable to sellers of credit card loss protection and business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may adopt. In expressing its support, NCL noted that, although most solicitations for credit card loss protection plans were made via outbound telephone calls, it endorsed excepting such plans from the exemption to ensure that they will be covered by the Rule regardless of how they are promoted.[983] Similarly, NCL supported the exclusion from the direct mail exemption of work-at-home solicitations, noting that in 2001, 42 percent of the victims of work-at-home scams said that the initial method of contact was direct mail.[984] Because work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception from the direct mail exemption will now ensure that inbound calls in response to direct mail advertising work-at-home opportunities will be subject to the Rule.

Some consumer advocates and law enforcement officials argued, however, that by simply narrowing the categories of offers eligible for the exemption, the proposed Rule did not

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[982] Presumably in the solicitation of a charitable contribution, there is no cost associated with refraining from making misrepresentations.

[983] NCL-NPRM at 12.

[984] *Id.*

go far enough to protect consumers.[985] Instead of narrowing the exemption, NCL recommended that the Commission eliminate the direct mail exemption altogether,[986] a position with which NAAG and AARP concurred at the June 2002 Forum.[987] NCL argued that telemarketing fraud and abuse could be prevented if those currently exempt from the Rule's coverage were required to adhere to its provisions, particularly those Rule provisions mandating material disclosures and express verifiable authorization.[988] As an alternative to eliminating the direct mail exemption, NCL suggested that all telemarketers should be required to obtain customers' express verifiable authorization in every call, even those that would otherwise be exempt, such as inbound calls in response to a direct mail solicitation.[989] NAAG suggested that the Rule should also except from the direct mail exemption transactions that involve a high risk of abuse, such as the sale of memberships for discount buyers clubs and for transactions involving negative option features.[990]

Based on a review of the record, the Commission declines to adopt these suggestions. In the SBP of the original Rule, the Commission noted that the direct mail exemption was included in the Rule because, in its experience, direct mail solicitations were not "uniformly related to the forms of deception and abuse the Act seeks to stem."[991] Based on this understanding, and in an effort to strike the appropriate

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[985] *See* NCL-NPRM at 12 (expressing concern that increasing the number of exceptions to exemptions is confusing to businesses and consumers).

[986] NCL-NPRM at 12.

[987] June 2002 Tr. III at 177, 182-83.

[988] NCL-NPRM at 12.

[989] *Id.*

[990] *See* NAAG-NPRM at 59.

[991] 60 FR at 43860.

balance between reining in fraudulent telemarketers and not unduly burdening legitimate industry, the Commission included the direct mail exemption in the original Rule. While it may be true that fraudulent telemarketing scams might be reduced if the direct mail exemption were excised from the Rule, the Commission believes that to do so would tip the balance and unnecessarily burden legitimate telemarketers without bringing commensurate benefits to consumers. Therefore, the Commission declines to eliminate the exemption entirely.

The Commission also declines to require express verifiable authorization in all calls. The parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3). Finally, the Commission declines to add the sale of discount buyers club memberships and solicitations in which there is a negative option feature to the exceptions to the direct mail exemption. The record does not demonstrate that the sale of membership clubs or solicitations in which there is a negative option feature are particularly subject to abuse in conjunction with direct mail solicitations, and thus does not support including such exceptions.[992]

Other suggested changes

Some commenters raised concerns about the situation where there is a disparity between the disclosures made in a direct mail solicitation and those made in the subsequent telephone call. NAAG urged the Commission to clarify that a

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[992] The record does show that buyers club memberships have frequently been associated with complaints regarding preacquired account telemarketing, a practice that is addressed by amended Rule § § 310.4(a)(5) and (6). Similarly, goods or services offered in conjunction with a "free-to-pay conversion" negative option feature have been shown to result in complaints of unauthorized charges, and are addressed by amended Rule § 310.4(a)(6) and § § 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

pre-call mailing is not truthful if it is inconsistent in some material way with what is stated during the call.[993]

In order to avail itself of the exemption, a direct mail solicitation must provide the material disclosures required by § 310.3(a)(1) to ensure that the material information about the offer is in the hands of the consumer when the consumer elects whether to place a call to a telemarketer, including information about the total cost and quantity of the goods or services, all material restrictions, limitations or conditions to the offer, and certain information regarding refund policies and prize promotions. By its very definition, this material information is presumed "likely to affect a person's choice of goods or services, or their conduct regarding them."[994] Thus, in order to meet the Rule's requirement that the information in the direct mail solicitation be "truthful," the information provided to the consumer in the telemarketing call should not vary in any material respect from the disclosures provided in the direct mail solicitation.[995]

AFSA expressed concern over the "specter of vicarious liability" for telemarketers who receive inbound calls in response to direct mail solicitations sent by another party in which the required disclosures are not made "truthfully." The Commission believes that under § 310.3(b), the assisting and facilitating provision, liability would only attach if a telemarketer knew or consciously avoided knowing that there was a disparity between the material representations in a

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[993] NAAG-NPRM at 59-60.

[994] *Cliffdale*, 103 F.T.C. at 165.

[995] The Commission recognizes that, in some instances, prices may be subject to change, or may only be in effect for a specified period of time. A [disclosure to that effect in the direct mail solicitation should provide the consumer with sufficient notice that the price may fluctuate or may not be available after a particular date.

direct mail piece and the telemarketing script being used in inbound calls in response to that solicitation.

EFSC requested, in connection with the proposal to broaden the direct mail provision to include solicitations by email and fax, that the Commission explicitly state that "a telemarketer's electronic disclosure of the material information satisfies" the telemarketer's obligation under the Rule.[996] EFSC argued that the E-SIGN Act makes such electronic disclosures permissible, and that the Commission should explicitly state that such is the case.[997] As noted above, in the response to DMA's suggestion that it should be permissible to make the required disclosures in the email or fax or in the subsequent telemarketing call, the Commission believes that to avail itself of the direct mail exemption, the seller must include the required disclosures in the direct mail piece itself, for to make these disclosures outside that context would defeat the consumer protection purpose of that requirement.[998] Thus, for the same reason, the Commission believes that in the case of any direct mail solicitation conveyed by email or fax, the required disclosures would

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[996] EFSC-NPRM at 12.

[997] *Id.*

[998] The Commission believes that for purposes of § 310.6(b)(6), it is critical that telemarketing calls in response to direct mail solicitations be exempt only on the condition that the direct mail piece contains the requisite disclosures. The requirement that these disclosures be displayed in the direct mail piece itself ensures that these disclosures are proximate in time and location to the direct mail solicitation, which makes it more likely that consumers will be made aware of certain material information that is useful or necessary to evaluate the sales transaction proposed in the solicitation before responding to it. The Commission notes that this outcome is consistent with § 101(f) of the E-SIGN Act, which states that, "Nothing in this title affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, *disclosure*, or other record required to be posted, *displayed*, or publicly affixed." (emphasis added).

have to be included in the email or fax itself in order for any subsequent telemarketing call to benefit from the § 310.6(b)(6) exemption.

Finally, NFC requested that the Commission clarify whether the direct mail exemption applies to franchisors.[999] The Commission believes that § 310.6(b)(2) makes clear that sales of franchises subject to the Commission's Franchise Rule are exempt from the TSR. The sale of business opportunities not covered by the Franchise Rule, however, is subject to regulation by the Rule. Section 310.6(b)(6) of the amended Rule expressly states that a seller of "business opportunities other than business arrangements covered by the Franchise Rule" would not be able to avail itself of the direct mail exemption, and thus would be required to comply with the Rule's provisions. Therefore a business opportunity seller, if not eligible for exemption pursuant to § 310.6(b)(2), would be ineligible for the direct mail exemption because of the specific exception for the sale of such services under § 310.6(b)(6).

§ 310.6(b)(7)—Business-to-business telemarketing

Section 310.6(g) of the original Rule exempts from the Rule's requirements telemarketing calls to businesses, except calls to induce the sale of nondurable office or cleaning supplies. Based on the Commission's law enforcement experience, the Commission proposed in the NPRM to add two more categories to the list of exceptions to the exemption for calls to businesses: the sale of Internet or Web services, and charitable solicitations.[1000] The Commission has determined, however, based upon comments received in response to the NPRM, not to include in the amended Rule the exception of the sale of Internet or Web services and

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[999] NFC-NPRM at 4-5.

[1000] *See* NPRM discussion regarding proposed § 310.6(g), 67 FR at 4531-32.

charitable solicitations from the business-to-business exemption. The amended Rule retains unchanged the wording in the original Rule, except to add language clarifying that the Commission's national "do-not-call" registry provisions do not apply to the telemarketing of nondurable office or cleaning supplies to businesses. The provision is also renumbered, and can be found at § 310.6(b)(7) of the amended Rule.

Consumer groups and state law enforcement officials argued that the Rule should not contain any exemption for business-to-business telemarketing, but if the Commission were to retain the exemption, they supported narrowing the exemption as much as possible so that sellers and telemarketers of those products or services that have particularly been subject to abuse would not benefit from the exemption.[1001] Thus, these commenters generally supported the Commission's proposal to "carve out" the telemarketing of Internet and Web services from the business exemption, citing extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of website design, hosting, and maintenance services to small businesses.[1002]

On the other hand, industry commenters uniformly opposed the "carve out" of Internet and Web services from the business-to-business exemption.[1003] These commenters argued that the proposed definitions of these services were overly broad and that there was insufficient record evidence

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[1001] *See, e.g.*, NAAG-NPRM at 60; NCL-NPRM at 11.

[1002] NAAG-NPRM at 60; NCL-NPRM at 11.

[1003] *See, e.g.*, Comcast-NPRM at 5; Cox-NPRM at 30-32; ICC-NPRM at 1-2; Nextel-NPRM at 23, 24; Reed-Elsevier-NPRM at 5; SBC-NPRM at 2, 13; SIIA-NPRM at 1-2; YPIMA-NPRM at 5. *See also* June 2002 Tr. III at 210-20, 222-23, 226.

to support regulation of all Internet and Web services.[1004] They noted that federal and state law enforcement efforts had focused on website design, development, hosting, and maintenance services, but that the record does not reveal a pattern of fraud in the sale of Internet access services, including wireless Internet access services.[1005] Industry commenters argued that if the Commission persisted in requiring that the telemarketing of Internet and Web services comply with the TSR, the effect would be to chill innovation and development in a nascent industry that is rapidly changing.[1006] They also argued that such an action would be anticompetitive because it would subject those sellers and telemarketers who are within the FTC's jurisdiction to the TSR's requirements, while exempting competitors who happen to be common carriers.[1007] Furthermore, these commenters stated that although the Commission's goal is to protect small business from fraud in the sale of Internet and Web services, the Commission's proposal would actually harm those small businesses because it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.[1008] Industry commenters argued that current law enforcement tools, coupled with active industry

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[1004] *See, e.g.*, Nextel-NPRM at 23; SBC-NPRM at 3; SIIA-NPRM at 1-2. June 2002 Tr. III at 210-20, 222-23, 226.

[1005] *See, e.g.*, Nextel-NPRM at 23; SIIA-NPRM at 1-2. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1006] Nextel-NPRM at 24; Reed-Elsevier-NPRM at 7; SBC-NPRM at 14; SIIA-NPRM at 1-2. *See also* June 2002 Tr. III at 210-24.

[1007] *See, e.g.*, DMA-NPRM at 9. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1008] *See, e.g.*, SBC-NPRM at 15; SIIA-NPRM at 2. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

self-regulation, are sufficient to challenge deceptive and fraudulent telemarketing of Internet or Web services.[1009]

The Commission finds persuasive industry's arguments that the proposal to make the business-to-business exemption unavailable to telemarketing of Internet and Web services is overbroad and likely to produce perverse results for the small businesses it was intended to protect. The Commission believes that, although coverage by the Rule would provide benefits to law enforcement efforts, current federal and state consumer protection statutes have been effective tools in challenging fraudulent practices in this industry.[1010] Furthermore, the Commission believes that it is preferable to move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the Internet marketing revolution. Therefore, the Commission has removed the proposed exception for Internet and Web services sales to businesses by telephone, which will continue to be exempt from the Rule's coverage. The Commission will, however, continue to monitor closely the

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[1009] *See, e.g.*, Reed-Elsevier-NPRM at 4-5 (noting, for example, that industry has adopted the Best Billing Practices guidelines set forth by the FCC to address unauthorized billing or "cramming" problems); SBC-NPRM at 14. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1010] *See E-Commerce Fraud Targeted at Small Business: Hearings on Web Site Cramming Before the Senate Committee on Small Business* (Oct. 25, 1999) (statement of Jodie Bernstein, Director of the Bureau of Consumer Protection, FTC); FTC Press Release: "FTC Cracks Down on Small Business Scams: Internet Cramming is Costing Companies Millions," June 17, 1999, http://www.ftc.gov/opa/1999/small9.htm. *See also, e.g., FTC v. Shared Network Servs., LLC.*, No. S-99-1087-WBS JFM (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, No. H-99-3657 (S.D. Tex. filed Oct. 21, 1999) (Stipulated Final Order for Permanent Injunction and Other Equitable Relief entered Oct. 25, 1999); *FTC v. WebViper LLC*, No. 99-T-589-N, (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, No. SA CV-99-762 AHS (ANx) (C.D. Cal. filed June 7, 1999).

practices in the telemarketing of Internet and Web services, and may revisit this issue in subsequent Rule Reviews should circumstances warrant.

Consumer groups and state law enforcement officials also supported the Commission's proposal to make the business-to-business exemption unavailable to entities soliciting charitable contributions, citing the extensive problems with telefunders soliciting on behalf of public safety organizations (so-called "badge fraud" operators) who often target small businesses.[1011] DMA-NonProfit and Not-For-Profit Coalition were among the few non-profit organizations that addressed the business-to-business exemption,[1012] arguing that the legislative history of the USA PATRIOT Act does not support extending the Rule's coverage to charitable solicitations directed to businesses, particularly in the absence of substantial evidence of abuse.[1013] As discussed above, the Commission already has determined to exempt telemarketing on behalf of charitable organizations from the national "do-not-call" registry, thus addressing the principal concern of the non-profit organizations.

The Commission notes that "badge fraud" telemarketing directed at businesses has been a particularly pernicious practice that has been attacked on a regular basis by both the

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[1011] *See, e.g.*, NAAG-NPRM at 60-61; NCL-NPRM at 11. *See also* June 2002 Tr. III at 224-25.

[1012] Most non-profit organizations commented on the application of the national "do-not-call" registry to their solicitation efforts, not on whether they should be otherwise excepted from the business-to-business exemption. *See, e.g.*, Childhood Leukemia-NPRM at 1; Community Safety-NPRM at 1-2; California FFA-NPRM at 1-2; FPIR-NPRM at 1-2; HRC-NPRM at 1-2; OSU-NPRM at 1; SO-AZ-NPRM at 1-2.

[1013] *See* DMA-NonProfit-NPRM at 14-15; Not-for-Profit Coalition-NPRM at 46-48. There is scant legislative history on the USA PATRIOT Act with regard to this issue.

Commission and state regulators.[1014] Commenters have made it clear, however, that many legitimate non-profit organizations rely heavily on business contributions as a major portion of their donor base.[1015] The Commission seeks to protect businesses—particularly small businesses—from fraudulent fundraising, without burdening legitimate non-profit organizations with the cost of complying with unnecessary regulations. As some commenters pointed out, many legitimate non-profit organizations operate on a very narrow margin, and such costs may have a very significant impact on the viability of an organization's fundraising efforts or even the very viability of the organization itself.[1016]

The Commission also notes that law enforcement actions attacking badge fraud under Section 5 and analogous state laws have been effective on a case-by-case basis.[1017]

[1014] *See, e.g., FTC. v. Southwest Mktg. Concepts, Inc.*, No. H-97-1070 (S.D. Tex. filed 1999) (Stipulated Final Judgment and Order for Permanent Injunction and Monetary Relief entered May 28, 1999); *FTC v. Saja*, No. CIV-97-0666 PHX SMM (D. Ariz. filed Apr. 1997); *FTC v. Dean Thomas Corp., Inc.*, No. 1:97CV0129 (N.D. Ind. 1997) (Stipulated Final Judgment entered Jan. 19, 1998); *FTC v. Century Corp.*, No. 1:97CV0130 (N.D. Ind. filed Apr. 7, 1998) (Stipulated Final Judgment and Order entered April 8, 1998); *FTC v. Image Sales & Consultants*, Inc., No. 1:97CV0131, (N.D. Ind.) (Stipulated Final Judgment and Order entered June 9, 1998); *FTC v. Omni Adver., Inc.*, No. 1:98CV0301 (N.D. Ind. filed Oct. 9, 1998); *FTC v. T.E.M.M. Mktg., Inc.*, No. 1:98CV0300, (N.D. Ind. filed Oct. 5, 1998); *FTC v. Tristate Adver. Unlimited, Inc.*, No. 1:98CV0302 (N.D. Ind. filed Oct 5, 1998); *FTC v. Gold*, No. CV 99-99-2895-WDK (AIJx) (C.D. Calif. filed 1998); *FTC v. Eight Point Communications, Inc.*, No. 98-74855 (E.D. Mich. filed Nov. 10, 1998). *See also* Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

[1015] *See, e.g.*, DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*. *See also* June 2002 Tr. III at 110, 205-10, 220-21.

[1016] *Id.*

[1017] *See* note 1015 above.

Furthermore, several of the entities that were targets of these law enforcement efforts also telemarketed to individuals, which would bring them within the purview of the amended Rule with respect to those transactions.[1018] In addition, the Commission recognizes that there are many legitimate public safety organizations that solicit funds for their charitable purposes in a non-deceptive manner. Therefore, the Commission believes that the more prudent course is to continue to rely upon its authority under Section 5 and the states' authority under their analogous laws to address fraudulent fundraising, and, at this time, to leave beyond the scope of the TSR legitimate charitable fundraising directed to businesses. This issue could be revisited in subsequent Rule Reviews should evidence develop that the Commission has not struck the correct balance in making this determination.

Other recommendations by commenters

Some commenters recommended that the Rule be amended to include more exemptions. For example, several commenters advocated that their industry be exempt from compliance with the national "do-not-call" registry and/or from all of the Rule's provisions.[1019] The Commission notes that many of those who requested exemptions already are

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[1018] *See, e.g., Saja*, No. CIV-97-0666 PHX SMM; and *Fight Point Communications*, No. 98-74855.

[1019] *See, e.g.*, Tribune-NPRM at 2-3 (exempt newspapers because of their "unique position and mission in our society"); Herald Bulletin-NPRM at 1 (exempt newspapers); CNHI-NPRM at 1-2 (exempt newspapers); AFSA-NPRM at 10 (exempt debt collection calls); ACA-NPRM at 2-4 (expressly exempt debt collection activities from the Rule); DBA-NPRM at 5 (expressly exempt debt collectors from the "do-not-call" registry provision); AFSA-NPRM at 14 (exempt financial services companies with an established business relationship); CASE-NPRM at 3 (exempt educational institutions from "do-not-call" registry provision); ANA-NPRM at 7 (explicitly exempt market researchers); Green Mountain-NPRM *passim* (exempt energy marketers).

exempt from the Rule and, therefore, there is no reason to expressly restate that exemption in the Rule.[1020] The Commission also declines to add additional exemptions on behalf of specific industry segments, with the exception of charitable organizations. As noted above in the discussion on exempting charities from compliance with the national "do-not-call" registry provision, the Commission believes that charitable solicitations present unique circumstances that make an exemption necessary and appropriate. The Commission declines, however, to introduce further limitations to the applicability of the "do-not-call" registry because it believes such action would be inconsistent with the privacy mandate of the Telemarketing Act and would likely result in consumer confusion and frustration.

G. Section 310.7 —Actions by States and Private Persons.

Section 310.7 in the original and proposed Rules sets forth the procedures by which the states and private persons may bring actions under the Rule, as is provided for in the Telemarketing Act.[1021] In the NPRM, the Commission noted that it received no comments directly on this section, but that commenters were generally supportive of the Rule's enforcement scheme allowing the Commission, the states, and private parties to bring actions under the TSR.[1022] The Commission noted that the record at that time contained evidence of two sources of frustration regarding enforcement of the Rule: 1) the $50,000 monetary threshold required for a

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[1020] For example, debt collection and market research activities are not covered by the Rule because they are not "telemarketing"—*i.e.*, they are not calls made "to induce the purchase of goods or services." Of course, if the debt collection or market research call also included an upsell, the upsell portion of the call would be subject to the Rule as long as it met the criteria for "telemarketing" and was not otherwise exempt from the Rule.

[1021] 15 U.S.C. 6103 (states) and 6104 (private persons).

[1022] 67 FR at 4532-33.

private party to bring suit under the Rule; and 2) the difficulty in identifying Rule violators, particularly those who violate the abusive practices section of the Rule.[1023] The Commission noted then that the amount in controversy requirement was included in the Telemarketing Act, and it is therefore up to Congress to make any change to this amount.[1024] With regard to the difficulty in identifying violators, the Commission expressed its belief that two proposed provisions—the prohibition on blocking Caller ID information, and the prohibition on denying or interfering with a consumer's right to be placed on a "do-not-call" list—would be beneficial in addressing these concerns.[1025]

The Commission received no comments on this section in response to the NPRM, and thus no modifications are included in the amended Rule.[1026]

[1023] 67 FR at 4533.

[1024] *Id.*

[1025] *Id.*

[1026] Some commenters did advocate for meaningful Rule enforcement, including random monitoring and publicity regarding enforcement. *See* AARP-NPRM at 10 (meaningful enforcement and publicity); EPIC-NPRM at 27 (suggesting random monitoring and also recommending registration and bonding requirements, which the Commission declines to adopt noting the states already have such requirements in many instances, and that further duplication of that effort would not enhance the Commission's law enforcement efforts). The Commission believes that the enforcement record for the TSR to date, with over 139 cases brought and $200 million in judgments, shows that the Commission and its state law enforcement partners have made enforcement of the Rule a top priority. Moreover, enforcement actions under the Rule often have been conducted as part of a "sweep" of cases, often accompanied by a media advisory and public education campaign, which serves as a means of raising public awareness of certain kinds of telemarketing fraud. In regard to the suggestion that call centers be randomly monitored for compliance with the Rule, the Commission notes that it has used, and will continue to

H. Section 310.8—Fees.

This section of the Rule, now allocated for the new provision on fees, is reserved. When completed, the fee section will be included here.

I. Section 310.9—Severability.

This provision of the Rule is retained in the amended Rule, but renumbered as § 310.9. Section 310.8, formerly the section number for the Severability provision, now contains the provision regarding fees for the national "do-not-call" registry.

J. Rulemaking Review Requirement.

The original Rule required that a Rule Review proceeding be commenced within five years of the effective date of the original Rule. The amended Rule does not contain an equivalent provision. The Commission has a policy of reviewing all of its Rules and guides on a periodic basis to ensure that they continue to meet their goals and provide the protections that were intended when they were promulgated. This periodic review also provides an opportunity to examine the economic costs and benefits of the particular Rule or guide under review. The Commission believes that this periodic review should be sufficient for the amended Rule, and that it is unnecessary to include a specific provision regarding review within the text of the amended Rule.

K. Effective Date.

The amended Rule is effective on March 31, 2003, and full compliance with all provisions of the amended Rule—except § 310.4(a)(7), the caller identification transmission provision, and § 310.4(b)(1)(iii)(B), the national "do-not-call" registry provision—is required by that date. The Commission

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use, a variety of law enforcement techniques to ensure compliance with the Rule.

believes that making the amended Rule effective on March 31, 2003 will provide more than sufficient time for sellers and telemarketers to change their practices to conform to the amended Rule. The publication of the proposed Rule in January 2002 provided industry members with ample notice of the proposed changes in the Rule, and making the amended Rule effective on March 31, 2003 will give industry members sufficient additional time to familiarize themselves with the requirements of the amended Rule, and to ensure that their operations are in full compliance with all except two provisions of the amended Rule.

The Commission has determined that additional time may be required to allow sellers and telemarketers to come into full compliance with the caller identification transmission requirement. Therefore, full compliance with § 310.4(a)(7) is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry.

IV. Paperwork Reduction Act

In light of both changes to the Rule following the NPRM and public comments received on Commission staff's prior PRA burden analysis for the NPRM, staff will submit for OMB review and clearance a supporting statement detailing its revised burden analysis.

V. Regulatory Flexibility Act

A. Need for and Objectives of the Rule.

The amendments to the TSR announced here are the result of a review of the existing Rule as required by the

Telemarketing Act.[1027] As discussed above in this SBP, and in the NPRM, the objective of the amendments is to fulfill the mandate of the Telemarketing Act to ensure that consumers are protected from "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." [1028] Other amendments, relating to the solicitation of charitable contributions through telemarketing, are made pursuant to the USA PATRIOT Act.[1029]

B. Summary of the Significant Issues.

The public comments on the proposed Rule are discussed above throughout the SBP, as are the changes that have been made in response to comments indicating that the costs of some of the proposed amendments would be excessive. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive. In response to these comments, the Commission has made a number of modifications in the amended Rule. These changes should significantly reduce the burden on all businesses, including small businesses.

Calls permitted where there is an existing business relationship.

One proposal that commenters contended would impose particularly great costs on small businesses was the proposed national "do-not-call" registry. Commenters were particularly concerned with the requirement that businesses could only call consumers who had put their telephone numbers on the "do-not-call" registry if they had obtained the consumer's express verifiable authorization to make calls to that

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[1027] 15 U.S.C. 6108.

[1028] 15 U.S.C. 6102.

[1029] Pub. L. 107-56 (Oct. 26, 2001).

consumer. For example, Community Bankers expressed the concern that its members would be unable to use outside telemarketers to contact their existing customers. This would, they suggested, force community banks to do their own telemarketing, at higher cost, because calls made by third party telemarketing bureaus would be covered by FTC regulations.[1030] Another commenter noted that small firms may not have the recording equipment that would be needed to establish that they had obtained the consumer's express verifiable authorization to accept calls from that seller.[1031]

Furthermore, many small businesses may not keep their customer records in a form that would permit them to economically compare the telephone numbers of their customers with those on the national "do-not-call" registry and avoid calling those numbers that appear on the registry.[1032] According to NRF, converting their customer lists to a form that can be feasibly compared to the numbers on the national "do-not-call" registry could cost small businesses up to $1.00 per name. Furthermore, even after the records are converted, the NRF reports that the cost of eliminating names that appear on the "do-not-call" registry would be higher for small firms than for larger ones. Whereas, it might cost $0.01 per name to purge a large list, the cost for a small list is put at $0.10 to $0.15 per name.[1033]

[1030] Community Bankers-User Fee at 3.

[1031] AmEx-NPRM at 2. One small company reported that in order to comply with Oregon's "do-not-call" requirements, they had been forced to spend $12,500 to get a computer program written and have hired two additional employees at a cost of approximately $800 per week. (Celebrity Prime Foods-User Fee at 1).

[1032] *See, e.g.*, Ameriquest-NPRM at 9.

[1033] NRF-NPRM at 4-5. ERA placed the cost of comparing a company's calling lists against the "do-not-call" registry at $3 to $5 per 1,000 names, while CCC suggested that the cost would be in the neighborhood of $50 per hour and that it would take two hours for the

As discussed above in the SBP, the Commission has decided to alter the "do-not-call" provision proposed in the NPRM. One of the changes is to create an exemption that will allow a seller and its telemarketer to call consumers with whom the seller has an established business relationship, even if the consumer has placed his or her telephone number on the "do-not-call" registry.[1034] The effect of this change will be that businesses—and in particular small businesses—will not need to check their lists of existing customers against the national "do-not-call" registry. There will also be no need to obtain express verifiable permission before calling someone with whom the business has an established business relationship. Thus, most, if not all, of the costs described above will not be faced by small businesses.[1035]

Quarterly access to "do-not-call" registry.

In addition, as discussed above, the Commission has decided not to require sellers and telemarketers to scrub their calling lists against the national "do-not-call" registry on a monthly basis. Instead, such updating will only be required on a quarterly basis.[1036] Commenters argued that this change was necessary to reasonably limit the costs imposed by the

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average firm to compare their calling lists to the national "do-not-call" registry and delete from the company's lists any numbers that appear on the "do-not-call" registry. ERA-NPRM at 36; Miller Study at 11-12.

[1034] *See* discussion of § 310.4(b)(1)(iii) above.

[1035] While small businesses that wish to telemarket their products to consumers who are not existing customers will still have to check their calling lists against the "do-not-call" registry, they will not necessarily have to perform this work themselves. It is the Commission's understanding that small businesses often find it more economical to employ telemarketing bureaus who make such calls on the behalf of these businesses. A seller that employs a telemarketing bureau can arrange to have the telemarketer compare the names and/or telephone numbers on its lists against the "do-not-call" registry.

[1036] Amended Rule § 310.4(b)(3).

"do-not-call" registry.[1037] It should significantly reduce the expense associated with complying with the "do-not-call" requirements since firms will not need to scrub their lists twelve times per year at an expense that has been estimated at around $100 per seller or telemarketer each time its lists must be scrubbed.[1038]

Harmonization with state "do-not-call" regulations.

Many industry representatives argued that in order to avoid imposing an undue burden on business, particularly small businesses, it was essential that the proposed national "do-not-call" registry not simply be added on to the existing set of state "do-not-call" lists. Rather, in the view of industry, the national registry should incorporate existing and any future state lists and all of the lists should operate under a single, unified set of regulations.[1039] While many industry representatives argued that the way to achieve the necessary level of coordination between the state and federal lists was for the Commission to preempt inconsistent state regulations, the Commission has declined to do so at this time. Instead, as discussed above in the SBP, the Commission is engaged in a process of active consultation with the states that have enacted "do-not-call" statutes and with the FCC in order to develop procedures that will result in one harmonized "do-not-call" registry.[1040] Once fully effectuated, this harmonization should substantially reduce the burden of having to scrub against a large number of separate lists.

[1037] Household Bank-User Fee at 2.

[1038] Miller Study at 11-12.

[1039] *See, e.g.*, Household Bank-User Fee at 2-3; ARDA-User Fee at 1; Ameriquest-User Fee at 9-10; ICIA-User Fee at 1; NEMA-User Fee at 4.

[1040] This approach is consistent with the recommendation of the Small Business Administration ("SBA"), Office of Advocacy. See SBA-User Fee at 5-6.

For-profit fundraisers exempted from national "do-not-call" registry compliance.

The burden placed on small charities by the "do-not-call" requirements has also been significantly reduced. As discussed above, the Commission has determined that for-profit firms that make fundraising calls on behalf of charitable organizations will not be required to ensure that they are not making calls to consumers who have placed their telephone numbers on the national "do-not-call" registry.[1041] Rather, they will only have to honor individual consumer requests not to be called by the particular charity.[1042]

This change is likely to be of significant benefit to smaller charitable organizations since these organizations often find it more efficient to employ for-profit firms to make their calls rather than developing and maintaining the capacity to make such calls using their own staff.[1043] For example, APTS reported that 75 percent of their members chose to hire other firms to manage their telemarketing operations. They further reported that the average annual cost of outsourcing these operations was $182,000, whereas the estimated cost of the stations doing the same amount of telemarketing with its own personnel was $224,000, an increase of almost 25 percent.[1044] Similarly, Red Cross commented that it is more economical to hire a third party to operate short term blood-donor

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[1041] Amended Rule § 310.6(a).

[1042] Amended Rule § 310.4(b)(1)(iii).

[1043] Hudson Bay-Goodman-NPRM at 2. Hudson Bay noted that "[i]nstead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee."

[1044] APTS-NPRM at 3-4.

recruitment programs than to hire and maintain a full-time staff to perform such functions. According to Red Cross "[s]uch trained third party professionals offer expertise and operational efficiencies that cannot be rapidly duplicated by Red Cross to respond to the volatile demand for blood." [1045]

Written confirmation as express verifiable authorization.

Another change that should reduce the burden on small firms involves the procedures a firm may use to obtain the consumer's express verifiable authorization to use an account other than the consumer's credit card or debit card to pay for a purchase. In the NPRM, the Commission proposed to eliminate a procedure by which a firm was permitted to obtain authorization by sending the consumer written confirmation prior to the time the account was charged. In part this proposal was based on the impression that very few firms used this method of obtaining express verifiable authorization.[1046] However, commenters indicated that this was not the case and that many smaller firms—particularly newspapers—used this method.[1047] In response, the Commission has decided to retain the written confirmation method of obtaining express verifiable authorization, with certain modifications, including an exception that makes it unavailable in cases where the transaction involves a "free-to-pay conversion" feature and preacquired account information.[1048]

No ban on preacquired account information.

Another proposal in the NPRM that attracted considerable business opposition was the prohibition on the disclosure or

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[1045] Red Cross-NPRM at 3-4.

[1046] 67 FR at 4508.

[1047] *See, e.g.*, June 2002 Tr. III at 32-33 (NAA).

[1048] *See* amended Rule § 310.3(a)(3)(iii), and discussion of that provision above.

receipt of any consumer's billing information. Commenters argued that such a prohibition on the use of preacquired account information would increase the costs of telemarketing. While these costs were not argued to be specific to small businesses, the costs faced by small businesses would be increased along with those of larger ones. According to CCC, requiring the consumer to provide an account number would add between 60 and 90 seconds to the length of a telemarketing call in those instances where the telemarketer already has the consumer's account information.[1049] MPA estimated the cost of requiring consumers to repeat their account information in the case of an upsell to be between 35 and 60 seconds.[1050] In addition, MPA suggested that requiring consumers to read their account numbers in all instances would lead some consumers to decide not to purchase the item being offered. The effect could be, they suggested, a reduction of five to 30 percent in consumer purchases in response to particular offers.[1051] Finally, a ban on the use of preacquired account information could increase the costs of engaging in telemarketing because of errors in the account information obtained from the consumer—either because the consumer misreads the account number or because the telemarketer makes a mistake in taking down the number.[1052]

[1049] Miller Study at 17. According to the Miller Study, the total cost of this prohibition would have been approximately $1.5 billion. However, this estimate appears to be based on the incorrect assumption that the prohibition on the use of preacquired account information would add 60 to 90 seconds to every sale made in an outbound telemarketing call. In fact, the only sales that would be affected are those where the seller would otherwise obtain payment using preacquired account information.

[1050] MPA-NPRM at 24.

[1051] *Id.* at 19.

[1052] ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7.

As discussed in the SBP above, the Commission has decided not to prohibit the acquisition and use of preacquired account information. Instead, the Commission is limiting the prohibition to unencrypted account information and is requiring that telemarketers and sellers obtain the consumer's express informed consent before any purchase is charged to a consumer's account using preacquired account information. Except for transactions that involve a "free-to-pay conversion" feature combined with preacquired account information, the only steps a seller or telemarketer is required to undertake to obtain this consent are to provide the consumer with sufficient information for the consumer to understand the account that will be charged and to obtain the consumer's express agreement to have the purchase charged to that account. Since both of these are practices that an honest business would follow even in the absence of a rule provision, it is clear that the costs businesses argued would follow from the original proposal have been eliminated.

Relaxed regulation of abandoned calls.

Another proposal contained in the NPRM that businesses argued would significantly increase the costs of telemarketing was the proposal to prohibit telemarketers from "abandoning" telemarketing calls—that is, to prohibit making a call unless a telemarketing sales representative is available to talk to the consumer if the consumer answers. Critics of this proposal argued that it would effectively ban the use of predictive dialers.[1053] This would, they argued, significantly reduce the amount of time the individual telemarketing sales person spends talking to consumers. According to CCC, a telemarketing sales person can handle 13 to 14 calls per hour using a predictive dialer set to abandon five percent of calls. Without a predictive dialer, the same agent can only handle around

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[1053] June 2002 Tr. I at 211 (CCC); DMA-NPRM at 30; PCIC-NPRM at 2.

eight calls per hour—a reduction of about 40 percent.[1054] Another source suggested that a telemarketer using a predictive dialer could make 20 calls per hour, whereas only five calls per hour would be possible without the dialer.[1055]

As discussed in the SBP, the Commission has determined to create a safe harbor to the prohibition on abandoned calls. This safe harbor will allow firms to avoid being cited for violation of this provision of the Rule provided they play a recording that identifies the seller and provides the seller's phone number when a sales representative is not available to handle a call and provided that this occurs in three percent or less of calls that are answered by a consumer. This change should substantially reduce the burden that would have been imposed by a total prohibition on abandoned calls.[1056]

Regulation of upselling.

Finally, the Commission has eliminated an unintended burden that would have resulted from treating any upsell as a separate outbound telemarketing call. As several people have noted, this would have required telemarketers who receive

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[1054] Miller Study at 15.

[1055] Marketlink-NPRM at 3. This estimate, and perhaps the estimate of CCC, may overestimate the [efficiency losses from prohibiting abandoned calls in that the five calls per hour figure is based on the assumption that calls are dialed "manually." This suggests that the estimate may be based on an operation in which the individual sales representative actually dials the number to be called. A requirement not to abandon calls would not require that sales representatives dial their own calls. It would still be possible, if it were cost efficient, to use computer systems to dial the calls, and this could generate some efficiencies relative to manual dialing. What would not be permitted is to dial a call prior to the time a sales representative becomes available or to dial more than one call at a time for each available sales representative.

[1056] As CCC testified at the workshop, "[W]hat we found out is that . . . below 5 percent or 4 percent or 3 percent [rate of abandonment], you're really beginning to raise costs . . . ." June 2002 Tr. I at 212 (CCC).

inbound calls to comply with the "do-not-call" provisions of the Rule as well as the calling hours provision before offering any upsell product.[1057] Such a requirement would have imposed substantial burdens on sellers who receive inbound telemarketing calls. However, it was never the intention of the Commission to require compliance with either the "do-not-call" provisions or the calling hour provisions in this context,[1058] and this requirement has been eliminated in the amended Rule which provides a separate definition of an upsell and clarifies that these provisions do not apply to an upsell.

C. Description of Small Entities to Which the Rule Will Apply.

This Rule will primarily impact firms that make telephone calls to consumers in an attempt to sell their products or services or entities that make calls to solicit charitable contributions. That is, the Rule will primarily impact entities that make outbound calls to consumers. Also affected will be firms that provide such services for others on a contract basis. It has been estimated that outbound calls to consumers resulted in total sales of $274.2 billion in 2001, and that the telemarketing industry that markets to consumers employs 4.1 million workers.[1059]

The number of firms making such outbound telemarketing calls, and the number that qualify as small entities, cannot be reliably estimated. According to the Office of Advocacy of the SBA, United States Census data shows that there are 2,305 firms that are identified as telemarketing bureaus. Of these, 1,279 are classified as being small businesses because

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[1057] *See, e.g.*, June 2002 Tr. I at 210 (CCC); June 2002 Tr. II at 214-15 (DMA).

[1058] June 2002 Tr. I at 210-11 (FTC); June 2002 Tr. II at 215 (FTC).

[1059] DMA-NPRM at 5. ATA estimates employment in business-to-consumer telemarketing at 5.4 million. ATA-NPRM at 3.

they have sales of less than $5 million per year.[1060] These are firms that provide telemarketing services for other firms. However, not all of these firms will be impacted by the Rule to the same extent. According to NAICS, firms that are classified as telemarketing bureaus include firms that provide "telemarketing services on a contract or fee basis for others, such as (1) promoting clients' products or services by telephone, (2) taking orders for clients by telephone, and (3) soliciting contributions or providing information for clients by telephone."[1061] Firms that take orders for clients by telephone, as well as some firms that provide information for their clients by telephone, are going to be responding to calls made by consumers and not making calls themselves. Unless such firms are engaging in upselling of products or services that involve a "free-to-pay conversion" feature, they will not be impacted by the proposed Rule to any significant extent.

In addition to firms that provide telemarketing services for others, the Rule will have an effect on firms that use telemarketing as a way to market their own products. These may include, among others, retailers, manufacturers, and financial service providers.[1062] The number of such firms—and the number of those that are classified as small businesses—cannot be determined because such firms generally think of themselves as producers or sellers of particular products and not as telemarketers. Similarly, in the

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[1060] SBA-User Fee at 3. The size of telemarketing bureaus that qualify as being small businesses was increased to $6 million as of October 2, 2002. *See* SBA, Small Business Size Standards Matched to North American Industry Classification System (NAICS), http://www.sba.gov/size/sizetable2002.html.

[1061] U.S. Census Bureau, 1997 NAICS Definitions, 561 Administrative and Support Services, http://www.census.gov/pub/epcd/naics/NDEF561.HTM.

[1062] ATA-User Fee at 2.

available statistics, these firms will be classified as producers or sellers of particular products and not as telemarketers.[1063]

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule.

As discussed above in the SBP, the amended Rule alters some collection of information requirements. The effect of those requirements on all businesses is discussed in detail in the PRA section of this Notice. First, the amended Rule requires firms that use preacquired account information in conjunction with a "free-to-pay conversion" feature to tape record all such transactions to show that they have obtained the consumer's express informed consent to charge the consumer's account.[1064] Section 310.5(a)(5) requires that the seller or telemarketer maintain copies of such audio recordings for 24 months. Similarly, § 310.5(a)(5) requires that firms retain for 24 months copies of any written express agreements received from consumers permitting the company to call the consumer even though the consumer's phone number is included on the "do-not-call" registry.[1065] Finally, the amended Rule extends the recordkeeping requirements of § 310.5 to include charitable solicitations in a non-sales context, as required by the USA PATRIOT Act. All other amendments to the Rule relate to the Rule's disclosures or other compliance requirements and are necessary to prevent telemarketing fraud and abuse.

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices

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[1063] Some commenters suggested that small firms are more likely to rely on telemarketing to sell their products because they cannot afford other, more expensive forms of advertising. *See, e.g.*, Ameriquest-User Fee at 6; ATA-NPRM at 4.

[1064] *See* § 310.4(a)(6)(i)(C).

[1065] The provision allowing for such consent is at § 310.4(b)(1)(iii)(B)(*i*).

covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

E. Steps Taken to Minimize Impact on Small Entities.

As discussed above, the Telemarketing Act directs the Commission to enact "rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." [1066] Each of the amendments in the amended Rule is intended to better protect consumers from deceptive and abusive telemarketing practices. In order to achieve this end, the Commission believes that it is necessary to enact regulations that cover small and large firms equally. Based on the Commission's enforcement experience, it is clear that many of the firms that engage in fraudulent telemarketing activities are small firms. A failure to include such small firms within the requirements of the regulations would, therefore, fail to prohibit deceptive practices by the types of firms that account for a significant share of the problems the Commission encounters.

At the same time, as discussed above both in the SBP and in the "Summary of Significant Issues Raised by the Public Comments in Response to the IRFA," the Commission has sought to minimize as much as possible the burdens imposed on all affected entities, including small businesses. In general, the changes made in response to public comments have further reduced the burdens. The amendments to the disclosure and recordkeeping provisions of the TSR are generally consistent with the business practices that most sellers and telemarketers, regardless of size, would choose to follow, even absent legal requirements.

[1066] 15 U.S.C. 6102(a)(1).

The Commission has taken care in developing the amendments to the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. It also allows a seller and a telemarketer making calls on the seller's behalf to allocate between themselves the responsibility for maintaining required records.

VI. National Environmental Policy Act

Under the Commission's Rules of Practice implementing the National Environmental Policy Act of 1969 ("NEPA"),[1067] no "major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement ('EIS') has been prepared," if such is required.[1068] To determine if such an impact statement is required, the Commission generally prepares an "environmental assessment." However, such an environmental assessment is not necessary in every circumstance. For example, in circumstances when the "environmental effects, if any, would appear to be . . . so uncertain that environmental analysis would be based on speculation," no "environmental assessment" is required.[1069] The Commission believes, for the reasons set forth below, that this exception is applicable in the instant case, and that because the environmental effects, if any, of the amended TSR are uncertain and based on speculation, the Commission is not required to prepare an environmental assessment.

[1067] 42 U.S.C. 4321 *et seq.*

[1068] 16 CFR 1.81, 1.82.

[1069] 16 CFR 1.83. *See also National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

The amended TSR would modify the original Rule in several ways. Each of these is outlined above in Section I (F), which summarizes the changes in the amended Rule. However, the only comment that raised the issue of the environmental effects of the Rule did so solely with regard to the national "do-not-call" registry provision. Because the Commission does not believe that any other modification in the amended Rule implicates any impact on the environment, the analysis is confined to this provision.

The "do-not-call" registry provision will establish a centralized means for consumers across the country to notify sellers and telemarketers of their preference not to receive unsolicited outbound telemarketing calls.[1070] As discussed in greater detail above, in the section discussing § 310.4(b)(1)(iii), the "do-not-call" registry provision supplements the original Rule's provision that allows consumers to exercise their "do-not-call" rights on a company-by-company basis. The Commission determined, based on the extensive record evidence from the rulemaking proceeding, that a national "do-not-call" registry is necessary to effectuate the purposes of the Telemarketing Act.[1071]

The comment that addressed the potential environmental impact of the proposed national "do-not-call" registry stated, in relevant part,

> For obvious reasons the FTC's proposed action may drastically reduce the ability to sell goods and services via telemarketing. In addition, and for the reasons stated above [wherein the commenter argues that the national "do-not-call" registry will negatively impact inbound

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[1070] *See* discussion of § 310.4(b)(1)(iii) above.

[1071] 15 U.S.C. 6102(a)(3)(A) (mandating that the Commission include in its Rule "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy").

call centers who rely upon a combination of inbound and outbound calling to survive],[1072] consumers' ability to themselves purchase via catalogs may be compromised as well, as "call centers" are forced to close in the face of insufficient "outbound telemarketing work." Either event would force consumers to climb into their cars and return to the mall for their wares, a result that itself would increase gas consumption and cause more air pollution.[1073]

DeHart concluded, based on its belief that the "do-not-call" registry provision would increase the number of consumers driving to shopping at malls as a result of the implementation of the national "do-not-call" registry provision, that the Commission must prepare an EIS or, at minimum, an environmental assessment.[1074]

The underlying premise in the DeHart comment, that a national "do-not-call" registry will have a negative impact on call centers that rely in part on inbound telemarketing and in part on outbound telemarketing for their livelihood, is unsupported in the comment. No evidence, other than a mere allusion to a study that purportedly shows that some firms' cost of providing inbound call center service would increase if their outbound telemarketing load decreased, is provided by

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[1072] DeHart-NPRM at 2-3 (although the commenter alludes to a study that corroborates its assertion on this point, no title or citation is provided for such study).

[1073] DeHart-NPRM at 3.

[1074] *Id.* The Commission believes that this allegation would constitute, at most, "indirect effects" under the NEPA implementing regulations, or those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR 1508.8(b). The Commission does not believe that the "do-not-call" registry provision has been or could reasonably be alleged to have "direct effects" or those "caused by the action and occur at the same time and place." 40 CFR 1508.8(a).

DeHart, nor is support for this proposition found in the record as a whole. Therefore, the fundamental assumption on which DeHart's argument is based is one that appears to be mere speculation.

The Commission believes that speculation, and indeed, logic, could as easily lead to the conclusion that a diminution in outbound calling, resulting from consumers' decision to place their telephone numbers on the national "do-not-call" registry, could lead sellers to use other channels of distance marketing to sell their products, including channels that would significantly increase inbound telemarketing, such as direct mail, catalog sales, and Internet sales. This would mean that, even if many consumers utilize the "do-not-call" registry, inbound calling may benefit, not suffer, from such a result. Moreover, DeHart cites no authority for the proposition that local retail shopping has, to date, been reduced as a result of inbound or outbound telemarketing. And, the fact remains that, other than DeHart, none of the commenters, including major sellers, telemarketers, and industry groups, provides any evidence relating to the potential for a national "do-not-call" registry to result in a reduction in service or an increase in cost for inbound telemarketing, nor in a concomitant increase in retail shopping done in local malls.

Moreover, the Commission believes there can be no hard evidence on which to base a prediction of consumers' actions following the implementation of the "do-not-call" registry provision. It seems likely, based on the experience of states that have implemented statewide "do-not-call" lists, and the overwhelmingly high response of consumers to the Commission's proposal, that many consumers will avail themselves of the opportunity to place their telephone numbers on the national "do-not-call" registry. However, as noted above, this may or may not have any impact on consumers' decision to shop at local malls, or on their choice

of transportation. Thus, while consumer behavior may change as a result of the promulgation of amendments to the Rule, such changes cannot be quantified or even reasonably estimated because consumer decisions are influenced by many variables other than existence of the "do-not-call" registry. Any indirect impact of the amended Rule on the environment would therefore be highly speculative and impossible to accurately predict or measure.

The Commission does not believe that any alternative to creating a national "do-not-call" registry would both provide the benefits of the registry and ameliorate all potential concerns regarding environmental impact. For example, the Commission does not believe that given its justification for the necessity of the registry, eliminating the provision from the amended Rule would be appropriate based solely on the unsupported allegations of indirect environmental effect raised in the DeHart comment. Furthermore, the Commission can think of no alternative other than eliminating the national "do-not-call" registry that would address DeHart's unsupported and highly speculative concern.

In sum, although any evaluation of the environmental impact of the amendments to the TSR is uncertain and highly speculative, the Commission finds no evidence of avoidable adverse impacts stemming from the amended Rule. Therefore, the Commission has determined, in accordance with § 1.83 of the FTC's Rules of Practice, that no environmental assessment or EIS is required.[1075]

[1075] 16 CFR 1.83. *See also National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

List of Subjects in 16 CFR Part 310.

Telemarketing, Trade practices.

Accordingly, title 16, part 310 of the Code of Federal Regulations, is revised to read as follows:

PART 310—TELEMARKETING SALES RULE

Sec.

310.1 Scope of regulations in this part.

310.2 Definitions.

310.3 Deceptive telemarketing acts or practices.

310.4 Abusive telemarketing acts or practices.

310.5 Recordkeeping requirements.

310.6 Exemptions.

310.7 Actions by states and private persons.

310.8 Reserved: Fee for access to "do-not-call" registry.

310.9 Severability.

Authority: 15 U.S.C. 6101-6108.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or

to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller

different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays[1] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[2]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement

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[1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

[2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for

goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[4] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[5]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

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[3] Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

[4] Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and pre-acquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; *provided*, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or

for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[6] of that person; or

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[6] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the

Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4 (b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[7] ; and

(iv) the seller or telemarketer, in accordance with § 310.5 (b)-(d), retains records establishing compliance with § 310.4 (b)(4)(i)-(iii).

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[7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(c) *Calling time restrictions*. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services*. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations*. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully,

promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[8]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

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[8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4 (a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4 (a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided*, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3 (a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4 (a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4 (b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not

feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.§ 310.8 [Reserved: Fee for access to "do-not-call" registry.]

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

Appendix A

List of Acronyms for Rule Review Commenters

February 28, 2000 Request for Comment

Acronym—Commenter

AARP—AARP

Alan—Alan, Alicia

ARDA—American Resort Development Association

ATA—American Teleservices Association

Anderson—Anderson, Wayne

Baressi—Baressi, Sandy

Bell Atlantic—Bell Atlantic

Bennett—Bennett, Douglas H.

Biagiotti—Biagiotti, Mary

Bishop—Bishop, Lew & Lois

Blake—Blake, Ted

Bowman-Kruhm—Bowman-Kruhm, Mary

Braddick—Braddick, Jane Ann

Brass—Brass, Eric

Brosnahan—Brosnahan, Kevin

Budro—Budro, Edgar

Card—Card, Giles S.

Collison—Collison, Doug

Conn—Conn, David

Conway—Conway, Candace

Croushore—Croushore, Amanda

Curtis—Curtis, Joel

Dawson—Dawson, Darcy

DMA—Direct Marketing Association

DSA—Direct Selling Association

Doe—Doe, Jane

ERA—Electronic Retailing Association

FAMSA—FAMSA-Funeral Consumers Alliance, Inc.

Gannett—Gannett Co., Inc.

Garbin—Garbin, David and Linda

A. Gardner—Gardner, Anne

S. Gardner—Gardner, Stephen

Gibb—Gibb, Ronald E.

Gilchrist—Gilchrist, Dr. K. James

Gindin—Gindin, Jim

Haines—Haines, Charlotte

Harper—Harper, Greg

Heagy—Heagy, Annette M.

Hecht—Hecht, Jeff

Hickman—Bill and Donna

Hollingsworth—Hollingsworth, Bob and Pat

Holloway—Holloway, Lynn S.

Holmay—Holmay, Kathleen

ICFA—International Cemetery and Funeral Association

Johnson—Johnson, Sharon Coleman

Jordan—Jordan, April

Kelly—Kelly, Lawrence M.

KTW—KTW Consulting Techniques, Inc.

Lamet—Lamet, Jerome S.

Lee—Lee, Rockie

LSAP—Legal Services Advocacy Project

LeQuang—LeQuang, Albert

Lesher—Lesher, David

Mack—Mack, Mr. and Mrs. Alfred

MPA—Magazine Publishers of America, Inc.

Manz—Manz, Matthias

McCurdy—McCurdy, Bridget E.

Menefee—Menefee, Marcie

Merritt—Merritt, Everett W.

Mey—Mey, Diana

Mitchelp—Mitchelp

TeleSource—Morgan-Francis/Tele-Source Industries

NACHA—NACHA-The Electronic Payments Association

NAAG—National Association of Attorneys General

NACAA—National Association of Consumer Agency Administrators

NCL—National Consumers League

NFN—National Federation of Nonprofits

NAA—Newspaper Association of America

NASAA—North American Securities Administrators Association

Nova53—Nova53

Nurik—Nurik, Margy and Irv

PLP—Personal Legal Plans, Inc.

Peters—Peters, John and Frederickson, Constance

Reese—Reese Brothers, Inc.

Reynolds—Reynolds, Charles

Rothman—Rothman, Iris

Runnels—Runnels, Mike

Sanford—Sanford, Kanija

Schiber—Schiber, Bill

Schmied—Schmied, R. L.

Strang—Strang, Wayne G.

TeleSource—Morgan-Francis/Tele-Source Industries

Texas—Texas Attorney General

Thai—Thai, Linh Vien

Vanderburg—Vanderburg, Mary Lou

Ver Steegt—Ver Steegt, Karen

Verizon—Verizon Wireless

Warren—Warren, Joshua

Weltha—Weltha, Nick

Worsham—Worsham, Michael C., Esq.

Appendix B

List of Acronyms for NPRM Commenters

Acronym—Commenter

1-800-DoNotCall—1-800-DoNotCall, Inc.

AARP—AARP

ACA—ACA International

ACUTA—ACUTA

Advanta—Advanta Corp.

Aegis—Aegis Communications Group

Alabama Police—Alabama State Police Association, Inc.

AAST—American Association of State Troopers

ABA—American Bankers Association

ABIA—American Bankers Insurance Association

American Blind—American Blind Products, Inc.

ACE—American Council on Education

ADA—American Diabetes Association

Am Ex—American Express

AFSA—American Financial Services Association

Red Cross—American Red Cross

ARDA—American Resort Development Association

ARDA-2—American Resort Development Association-Do Not Call Registry

American Rivers—American Rivers

ASTA—American Society of Travel Agents

ATA—American Teleservices Association

Blood Centers—America's Blood Centers

Community Bankers—America's Community Bankers

Ameriquest—Ameriquest Mortgage Company

Armey—Armey, The Honorable Dick (U.S. House of Representatives)

AFP—Association of Fundraising Professionals

APTS—Association of Public Television Stations

ANA—Association of National Advertisers

Associations—joint comment of: American Teleservices Association, Direct Marketing Association, Electronic Retailing Association, Magazine Publishers Association, and Promotion Marketing Association

Assurant—Assurant Group

Avinta—Avinta Communications, Inc.

Ayres—Ayres, Ian

Baldacci—Baldacci, The Honorable John Elias (U.S. House of Representatives)

BofA—Bank of America

Bank One—Bank One Corporation

Beautyrock—Beautyrock, Inc.

BellSouth—BellSouth Corporation

Best Buy—Best Buy Company, Inc.

BRI—Business Response Inc.

CCAA—California Consumer Affairs Association

CATS—Californians Against Telephone Solicitation

Capital One—Capital One Financial Corporation

Car Wash Guys—WashGuy Systems

Carper—Carper, The Honorable Thomas R. (U.S. Senate)

Celebrity Prime Foods—Celebrity Prime Foods

Cendant—Cendant Corporation

Chamber of Commerce—Chamber of Commerce of the United States of America

CRF—Charitable Resource Foundation, Inc.

Chicago ADM—Chicago Association of Direct Marketing

Childhood Leukemia—Childhood Leukemia Foundation

CDI—Circulation Development, Inc.

CURE—Citizens United for Rehabilitation of Errants

Citigroup—Citigroup Inc.

Civil Service Leader—Civil Service Leader

Collier Shannon-Collier Shannon Scott

Comcast—Comcast

CNHI—Community Newspaper Holdings, Inc.

Community Safety—Community Safety, LLC

Connecticut—Connecticut Commissioner of Consumer Protection

CBA—Consumer Bankers Association

CCC—joint comment of: Consumer Choice Coalition, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation

CMC—Consumer Mortgage Coalition

Consumer Privacy—Consumer Privacy Guide

Convergys—Convergys Corporation

CCA—Corrections Corporation of America

CASE—Council for Advancement and Support of Education

Cox—Cox Enterprises

Craftmatic—Craftmatic Organization, Inc.

Davis—Davis, The Honorable Tom (U.S. House of Representatives)

DBA—Debt Buyers Association

DeHart—DeHart & Darr Associates

Deutsch—Deutsch, The Honorable Peter (U.S. House of Representatives)

DialAmerica—DialAmerica Marketing, Inc.

DMA—Direct Marketing Association/U.S. Chamber of Commerce

DMA-NonProfit—Direct Marketing Association NonProfit Federation

DSA—Direct Selling Association

Discover—Discover Bank

DC—District of Columbia, Office of the People's Counsel

Eagle—Eagle Bank

EFSC—Electronic Financial Services Council

EPIC—Joint comment: Electronic Privacy Information Center, Center for Digital Democracy, Junkbusters Corp, International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of Privacy Times, Privacyactivisim, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of Privacy Journal, Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc.

ERA—Electronic Retailing Association

EPI—Enterprise Prison Institute

Experian—Experian Marketing Information Solutions, Inc.

Fiber Clean—Fiber Clean

Roundtable—Financial Services Roundtable

Fire Fighters Associations:

Asheville FFA—Asheville (NC) Fire Fighters Association

Bethelehem FFA—Bethlehem (PA), IAFF Local 735

Boone FFA—Boone (IA)

California FFA—California Professional Firefighters

Cedar Rapids FFA—Cedar Rapids (IA), IAFF Local 11

Cedar Rapids Airport FFA—Cedar Rapids Airport (IA)

Chattanooga FFA—Chattanooga (TN) Fire Fighters Association, Local 820

Edwardsville FFA—Edwardsville (IL) Fire Fighters Local 1700

Greensboro FFA—Greensboro (NC)

Hickory FFA—Hickory (NC) Firefighters Association, IAFF Local 2653

Indiana FFA—Indiana, Professional Fire Fighters Union of

Iowa FFA—Iowa Professional Firefighters

Missouri FFA—Missouri State Council of Fire Fighters

North Carolina FFA—North Carolina, Professional Fire Fighters & Paramedics of

North Maine FFA—North Maine (Des Plaines, IL) Firefighters, IAFF Local 224

Ottumwa FFA—Ottumwa (IA)

Roanoke FFA—Roanoke (VA) Fire Fighters Association

Springfield FFA—Springfield (MO) Firefighters Association, Local 52

Sycamore FFA—Sycamore, IAFF Local 3046

Utah FFA—Utah, Professional Firefighters of

Vermont FFA—Vermont, Professional Firefighters of

Wisconsin FFA—Wisconsin, Professional Fire Fighters of

FireCo—FireCo, L.L.C.

Fleet—FleetBoston Financial Corporation

FOP—Fraternal Order of Police, Grand Lodge

FPIR—Fund for Public Interest Research, Inc.

FCA—Funeral Consumers Alliance, Inc.

Gannett—Gannett Co., Inc.

Gottschalks—Gottschalks, Inc.

Greater Niagara—Greater Niagara Newspapers

Green Mountain—Green Mountain Energy Company

Gryphon—Gryphon Networks

Hagel, Johnson & Carper—Joint letter from: The Honorable Chuck Hagel, Tim Johnson, and Thomas R. Carper (U.S. Senate)

Hastings—Hastings, The Honorable Doc (U.S. House of Representatives)

Herald Bulletin—Herald Bulletin

Horick—Horick, Bob

Household International:

Household Auto—Joint comment: Household Finance Corp, OFL-A Receivables Corp., and Household Automotive

Household Credit—Household Bank, Credit Card Services

Household Finance—Household Finance Corporation

Household-Montalvo—Montalvo, David

HSBC—HSBC Bank USA

Hudson Bay-Anderson—Hudson Bay Company of Illinois-owner

Hudson Bay-Goodman—Hudson Bay Company-Goodman

HRC—Human Rights Campaign

IBM—IBM

ICT—ICT Group, Inc.

Illinois Police—Illinois Council of Police & Sheriffs

Infocision—Infocision Management Corporation

Inhofe—Inhofe, The Honorable James (U.S. Senate)

Insight—Insight Realty, Inc.

ITC—Interactive Teleservices Corp.

ICFA—International Cemetery & Funeral Association

IFA—International Franchise Association

IUPA—International Union of Police Associations

ICC—Internet Commerce Coalition

Intuit—Intuit Inc.

Italian American Police—Italian American Police Society of New Jersey

Johnson—Johnson, The Honorable Tim (U.S. Senate)

Kansas—Kansas, House of Representatives

KeyCorp—KeyCorp.

Lautman—Lautman & Associates

LSAP—Legal Services Advocacy Project

Leggett & Platt—Leggett & Platt

Lenox—Lenox Inc.

Leukemia Society—Leukemia & Lymphoma Society

Life Share—Life Share

Lucas—Lucas, The Honorable Ken (U.S. House of Representatives)

MPA—Magazine Publishers Association

Make-A-Wish—Make-A-Wish Foundation of America

Manzullo—Manzullo, The Honorable Donald A. (U.S. House of Representatives)

March of Dimes—March of Dimes Birth Defects Foundation

Marketlink—Marketlink, Inc.

MBA—Massachusetts Bankers Association

MasterCard—MasterCard International

MBNA—MBNA America Bank, N.A.

McClure—McClure, Scott

McConnell—McConnell, The Honorable Mitch (U.S. Senate)

Metris—Metris Companies, Inc.

Michigan Nonprofit—Michigan Nonprofit Association

MidFirst—MidFirst Bank

MBAA—Mortgage Bankers Association of America

Myrick—Myrick, The Honorable Sue (U.S. House of Representatives)

NACHA—NACHA-The Electronic Payments Association

Nadel—Nadel, Mark S. (law review article: "Rings of Privacy: Unsolicited Telephone Calls and the Right to Privacy," 4 Yale Journal on Regulation 99 (Fall 1986)

NAAG—National Association of Attorneys General

NACAA—National Association of Consumer Agency Administrators

NAIFA—National Association of Insurance & Financial Advisors

NAR—National Association of Realtors

NARUC—National Association of Regulatory Utility Commissioners

ARVC—National Association of RV Parks & Campgrounds

NASCO—National Association of State Charity Officials

NASUCA—National Association of State Utility Consumer Advocates

E-Commerce Coalition—National Business Coalition on E-Commerce & Privacy

NCTA—National Cable & Telecommunications Association

National Children's Cancer—National Children's Cancer Society, Inc.

NCLC—Joint comment: National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and US Public Interest Research Group

NCLF—National Children's Leukemia Foundation

NCL—National Consumers League

NEMA—National Energy Marketers Association

NFPPA—National Family Privacy Protection Association

NFIB—National Federation of Independent Business

NFC—National Franchise Council

NFDA—National Funeral Directors Association

NNA—National Newspaper Association of America

NPMA—National Pest Management Association

NPR—National Public Radio

NRF—National Retail Federation

NTC—National Troopers Coalition

Nelson—Nelson, The Honorable E. Benjamin (U.S. Senate)

NetCoalition—NetCoalition

Nethercutt—Nethercutt, The Honorable George R., Jr. (U.S. House of Representatives)

NeuStar—NeuStar, Inc.

New Orleans—New Orleans, City Council of (CNO)-Utility, Cable & Telecommunications Committee

NJ Police—New Jersey Police Officers Foundation, Inc.

NYSCPB—New York State Consumer Protection Board

NAA—Newspaper Association of America

Nextel—Nextel Communications, Inc.

Ney, Sandlin, Jones, Shows and Cantor—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones,

Ronnie Shows, and Eric Cantor (U.S. House of Representatives)

Noble—Noble Systems

NATN—North American Telephone Network LLC

NC Zoo—North Carolina Zoological Society

Not-For-Profit Coalition—Not-For-Profit and Charitable Coalition

NSDI—NSDI Teleperformance

OSU—Ohio State University

OTC—Ohio Troopers Coalition

Pacesetter—Pacesetter Corporation

PVA—Paralyzed Veterans of America

Paramount—Paramount Lists, Inc.

Pascrell—Pascrell, The Honorable Bill, Jr. (U.S. House of Representatives)

Patrick—Patrick, George W.

Paul—Paul, The Honorable Ron (U.S. House of Representatives)

Pelland—Pelland, Paul

PLP—Personal Legal Plans, Inc.

Michigan Police—Police Officers Association of Michigan

possibleNOW—possibleNOW.com, Inc.

PRC—Privacy Rights Clearinghouse

Private Citizen—Private Citizen, Inc.

Proctor—Proctor, Alan

PBP—Progressive Business Publications

PCIC—Progressive Casualty Insurance Company

Angel Food—Project Angel Food

PMA—Promotion Marketing Association

Purple Heart—Purple Heart Service Foundation, Military Order of

Ramstad—Ramstad, The Honorable Jim (U.S. House of Representatives)

Redish—Redish, Martin H., Esq.

Reed Elsevier—Reed Elsevier Inc.

Reese—Reese Brothers, Inc.

SBC—SBC Communications Inc.

Schrock—Schrock, The Honorable Edward L. (U.S. House of Representatives)

Sensenbrenner—Sensenbrenner, The Honorable F. James, Jr. (U.S. House of Representatives)

SHARE—SHARE

SIIA—Software & Information Industry Association

Southerland—Southerland, Inc.

Southern Poverty—Southern Poverty Law Center

Special Olympics—Special Olympics, Inc.

SO-AZ—Special Olympics Arizona

SO-CA—Special Olympics Southern California

SO-CO—Special Olympics Colorado

SO-CN—Special Olympics Connecticut

SO-IA—Special Olympics Iowa

SO-KY—Special Olympics Kentucky

SO-MD—Special Olympics Maryland

SO-MO—Special Olympics Missouri

SO-MT—Special Olympics Montana

SO-NH—Special Olympics New Hampshire

SO-NJ—Special Olympics New Jersey

SO-NM—Special Olympics New Mexico

SO-NY—Special Olympics New York

SO-VT—Special Olympics Vermont

SO-VA—Special Olympics Virginia

SO-WA—Special Olympics Washington

SO-WI—Special Olympics Wisconsin

SO-WY—Special Olympics Wyoming

Spiegel—Spiegel, Marilyn

Stage Door—Stage Door Music Productions, Inc.

Statewide Appeal—Statewide Appeal Inc.

Success Marketing—Success Marketing, Inc.

Synergy Global—Synergy Global Networks, The

Synergy Solutions—Synergy Solutions, Inc.

Sytel—Sytel Limited

Tate—Tate & Associates

Technion—Technion Communications Corp

TDI—Telecommunications for the Deaf, Inc.

TeleDirect—TeleDirect International, Inc.

Telefund—Telefund, Inc.

Teleperformance—Teleperformance USA

TRC—Tele-Response Center

TeleStar—TeleStar Marketing, L.P.

TRA—Tennessee Regulatory Authority

Terry—Terry, The Honorable Lee (U.S. House of Representatives)

Texas Environment—Texas Campaign for the Environment

Texas PUC—Texas Office of Public Utility Counsel

Thayer—Thayer, Richard E., Esq.

Time—Time, Inc.

Tribune—Tribune Publishing Company

UNICOR—UNICOR: (Federal Prison Industries, Inc, DOJ, Federal Bureau of Prisons)

DOJ—U.S. Department of Justice

Uniway—Uniway of Coastal Georgia

Verizon—Verizon Companies

Virginia—Virginia Attorney General

VISA—VISA U.S.A., Inc.

Watts—Watts, The Honorable J.C., Jr. (U.S. House of Representatives)

Weber—Weber, Ron & Associates, Inc.

Wells Fargo—Wells Fargo & Company

White—White, David T.

WTA—Wisconsin Troopers' Association Inc.

Worsham—Worsham, Michael C., Esq.

YPIMA—Yellow Pages Integrated Media Association (YPIMA)

Supplemental Comments

AARP-Supp.—AARP

AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)

Allstate-Supp.—Allstate Life Insurance Company

Community Bankers-Supp.—America's Community Bankers

AICR-Supp.—The American Institute for Cancer Research (Kathryn L. Ward)

Red Cross-Supp.—American Red Cross

ARDA-Supp.—The American Resort Development Association (Yartin DePoy and Stratis Pridgeon)

ATA-Supp.—American Teleservices Association

Associations-Supp.—Associations Letter

Avinta-Supp.—Avinta (Abe Chen)

Bond-Supp.—Bond, The Honorable Christopher S. (U.S. Senate)

Celebrity Prime Foods-Supp.—Celebrity Prime Foods

Chesapeake-Supp.—The Chesapeake Bay Foundation (Amelia Koch and Melissa Livingston)

Christian Appalachian-Supp.—The Christian Appalachian Project

Comic Relief-Supp.—Comic Relief, Inc. (Dennis Albaigh)

Covington & Burling-Supp.—Covington and Burling

DialAmerica-Supp.—DialAmerica Marketing, Inc.

DMA Letter-Supp.—Direct Marketing Association-Transmittal Letter

DMA Study-Supp.—Direct Marketing Association-Study

ERA and PMA-Supp.—Electronic Retailing Association and Promotion Marketing Association

EPI-Supp.—Enterprise Prison Institute

Domenici-Supp.—Domenici, The Honorable Pete V. (U.S. Senate)

FDS-Supp.—Federation Department Stores

Hoar-Supp.—Hoar, Wesley C.

Illinois-Supp.—Illinois Attorney General's Office

ICTA-Supp.—Industry Council for Tangible Assets

Luntz-Supp.—Luntz Research Companies (Chrys Lemon)

MPA-Supp.—Magazine Publishers of America

Maryland-Supp.—Maryland Attorney General's Office (Carol Beyers)

McIntyre-Supp.—McIntyre Law Firm, PLLC (Chrys Lemon)

McKenna-Supp.—McKenna, Douglas M.

Memberworks-Supp.—Memberworks National Survey Topline (Chrys Lemon)

Minnesota-Supp.—Minnesota Attorney General's Office

Missouri-Supp.—Missouri Attorney General's Office

NACDS-Supp.—National Association of Chain Drug Stores

Ney, Sandlin, Jones, Shows and Cantor-Supp.—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)

NAR-Supp.—National Association of Realtors

NWF-Supp.—National Wildlife Federation

NAA June 28-Supp.—Newspaper Association of America (John F. Sturm)

NAA July 31-Supp.—Newspaper Association of America

Not-For-Profit Coalition-Supp.—Not-For-Profit and Charitable Coalition

PMA-Supp.—Promotion Marketing Association

Putnam-Supp.—Putnam, The Honorable Adam H. (U.S. House of Representatives)

Riley-Supp.—Riley, The Honorable Bob (U.S. House of Representatives)

SBC-Supp.—SBC Communications Inc.

Time-Supp.—Time, Inc.

Vermont-Supp.—Vermont Attorney General's Office

WWF-Supp.—World Wildlife Fund (Deborah Hechinger)

Worsham-Supp.—Worsham, Michael C.

User Fee Comments

AARP-User Fee—AARP

ABA-User Fee—American Bankers Association

Red Cross-User Fee—American Red Cross

ARDA-User Fee—American Resort Development Association

ATA-User Fee—American Teleservices Association

Community Bankers-User Fee—America's Community Bankers

Ameriquest-User Fee—Ameriquest Mortgage Company

Celebrity Prime Foods-User Fee—Celebrity Prime Foods

CBA-User Fee—Consumer Bankers Association

DialAmerica-User Fee—DialAmerica Marketing, Inc.

DMA Letter-User Fee—Direct Marketing Association

DMA Comments-User Fee—Direct Marketing Association

Discover-User Fee—Discover Bank

ERA/PMA-User Fee—Electronic Retailing Association and Promotion Marketing Association (joint comment)

Household-User Fee—Household Bank (SB), N.A. and Household Bank (Nevada), N.A. (joint comment)

Hudson Bay-User Fee—Hudson Bay Company of Illinois, Inc.

ICTA-User Fee—Industry Council for Tangible Assets

InfoCision-User Fee—InfoCision Management Corporation

ITC-User Fee—Interactive Teleservices Corporation

MPA-User Fee—Magazine Publishers of America

MasterCard-User Fee—MasterCard International, Inc.

NACDS-User Fee—National Association of Chain Drug Stores

NAR-User Fee—National Association of Realtors

NASUCA-User Fee—National Association of State Utility Consumer Advocates

NEMA-User Fee—National Energy Marketers Association

Not-For-Profit Coalition-User Fee—Not-For-Profit and Charitable Coalition

SBC-User Fee—SBC Communications, Inc.

Tennessee-User Fee—Tennessee Regulatory Authority

SBA-User Fee—United States Small Business Administration, Office of Advocacy

Visa-User Fee—Visa U.S.A., Inc.

Wells Fargo-User Fee—Wells Fargo & Company

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule*, File No. R411001

I wholeheartedly support the amendments to the Telemarketing Sales Rule ("TSR"), because I believe that they will help protect consumers from deceptive and abusive telemarketing practices. In particular, these amendments will give consumers the ability to avoid the sheer volume of unwanted telemarketing calls that many consider to be a nuisance. I write separately to explain my views on two issues—how the Commission determines whether an act or practice is "abusive" for purposes of the TSR, and the national do-not-call registry.

Abusive Telemarketing Acts or Practices

The Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") directs the Commission to promulgate rules that prohibit "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. 6102 (a)(1). To determine what constitutes an abusive telemarketing practice, the Commission for the most part has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples. I agree that this is an appropriate analysis, and in light of the rulemaking record as a whole, I fully support the TSR amendments that fall within these parameters. These amendments include, among other things, the provisions involving the national do-not-call registry, transmission of caller identification information, and abandoned calls and predictive dialers.

When the Commission seeks to identify practices as abusive that are less distinctly within the parameters of the Act's examples and their emphasis on privacy protection, the

Commission employs its traditional unfairness analysis.[1] I understand the Commission's intention to narrow the potentially expansive scope of the term "abusive" by using its unfairness analysis. However, given the broad ordinary meaning of the term "abusive," I believe that the standard for determining what constitutes an abusive telemarketing practice likely is broader than the stringent definition of the term "unfair." Therefore, I would have preferred it had the Commission looked to the plain meaning of the term "abusive" and then formulated a separate standard to identify abusive telemarketing practices for purposes of the Telemarketing Act and the TSR.

Nevertheless, I agree with the Commission's conclusion that a telemarketing practice that meets the strict unfairness standard will constitute an abusive practice for purposes of the Act and the TSR. In light of the rulemaking record, I therefore support the TSR amendments that are analyzed under this standard. This includes the requirement that telemarketers obtain consumers' or donors' express informed consent before causing their information to be submitted for payment. The rulemaking record evidences the harm that results from unauthorized billing, the need for the consent

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[1] Given that nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use its unfairness standard to determine which practices are abusive, I previously raised concerns about this analysis and requested comment on this issue. Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review, File No. R411001, available at (www.ftc.gov/os/2002/01/swindletsrstatment.htm). Although some comments agreed with this concern, they did not offer an alternative analysis of abusive practices beyond suggesting that the Commission's authority is limited to the examples of abusive practices included in the Telemarketing Act and its legislative history. *See* Statement of Basis and Purpose at 100, n. 428. However, because the Act does not limit the Commission's authority to identify abusive practices to the examples in the Act, the Commission may prohibit other practices that it identifies as abusive.

requirement, and the need to mandate specific steps that telemarketers must take to obtain consumers' consent in transactions involving preacquired account information.

In addition, the record supports the prohibition on the disclosure or receipt, for consideration, of unencrypted account numbers for use in telemarketing (except to process a payment for goods or services or a charitable contribution pursuant to a transaction). I do not believe that the mere disclosure of personal financial information, without more, causes or is likely to cause substantial consumer injury. In this situation, however, the rulemaking record provides a basis for concluding that trafficking in unencrypted account numbers is likely to cause substantial consumer injury in the form of unauthorized billing. Industry comments state that there is no legitimate reason to purchase unencrypted lists of credit card numbers. Therefore, there is a strong likelihood that telemarketers who do engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers' accounts. The Commission's law enforcement experience corroborates this conclusion. [2]As a result, I conclude that this practice is abusive for purposes of the Telemarketing Act.

The National Do-Not-Call Registry

The Telemarketing Act and the TSR recognize consumers' "right to be let alone." *See, e.g., Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the "right to be let alone" is the "most comprehensive of rights and the right most valued by civilized men"). In the context of telemarketing, there is an inherent tension between this

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[2] *See* Statement of Basis and Purpose at 97-98. In addition, given the evidence that the use of encrypted account information in telemarketing can result in unauthorized charges, there is an even greater likelihood that injury will occur when a telemarketer has obtained, for consideration, consumers' actual credit card numbers.

right and the First Amendment's right to free speech. With this in mind, and in light of the rulemaking record as a whole, the Commission has determined to establish a national do-not-call registry. This will enable consumers to stop certain telemarketing calls—calls to induce the purchase of goods and services from companies within the FTC's jurisdiction (except where the consumer has an "established business relationship" with the seller).

Although the USA PATRIOT Act of 2001 gave the Commission authority to regulate for-profit companies that make telephone calls seeking charitable donations on behalf of charities, the Commission has determined to exempt these entities from the national do-not-call registry requirements. Instead, the Commission requires these telemarketers to comply with the "entity-specific" do-not-call provision, which prohibits them from calling consumers who have said they do not want to be called by or on behalf of a particular entity. This more narrowly tailored approach seeks to protect consumers from unwanted telemarketing calls seeking charitable donations, while minimizing the impact of the TSR on charities' First Amendment rights. I do not object to taking this approach at the outset; but if there is evidence that suggests that this approach is not effective in protecting consumers from unsolicited telemarketing calls, the Commission should revisit this decision and require for-profit telemarketers seeking charitable donations to comply with the national do-not-call registry.

While I believe that the amended TSR and the national do-not-call registry will go a long way to help consumers prevent unwanted intrusions into their homes, a number of entities are not subject to the TSR's requirements. Under the Telemarketing Act and the TSR, the Commission does not have jurisdiction in whole or in part over the calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political

fund-raisers. From the perspective of consumers, the right to be let alone is invaded just as much by unwanted calls from exempt entities (e.g., banks, telephone companies, or political fund-raisers) as it is by such calls from covered entities.[3] Therefore, I believe that the entire spectrum of entities that make telemarketing calls to consumers should be subject to do-not-call requirements.

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[3] The Federal Communications Commission, however, has requested comment on whether to establish a national do-not-call registry that would address telemarketing calls by at least some of the entities that are exempt from the FTC's jurisdiction. Notice of Proposed Rulemaking, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 67 FR 62667 (Oct. 8, 2002).

No. 03-

Supreme Court, U.S.
FILED

IN THE 031552 MAY 14 2004

Supreme Court of the United States

OFFICE OF THE CLERK

AMERICAN TELESERVICES ASSOCIATION, MAINSTREAM MARKETING SERVICES, INC., AND TMG MARKETING, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (Continued) VOLUME III

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APPENDIX H

Before the
Federal Communications Commission
Washington, D.C. 20554

CG Docket No. 02-278

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Adopted: August 18, 2003
Released: August 18, 2003

ORDER ON RECONSIDERATION

By the Commission:

1. On July 3, 2003, the Federal Communications Commission (Commission) released a Report and Order revising many of its telemarketing and facsimile advertising rules pursuant to the Telephone Consumer Protection Act of 1991 (TCPA).[1] Pursuant to Section 1.108 of the Commission's rules,[2] on our own motion, we issue this limited reconsideration of the *Report and Order* and extend, until January 1, 2005, the effective date of our determination that an

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[1] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 03-153, Report and Order (rel. July 3, 2003) (*Report and Order*). A summary of this Report and Order was published in the Federal Register on July 25, 2003 (68 Fed. Reg. 44144).

[2] 47 C.F.R. § 1.108.

established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements. We also extend, until January 1, 2005, the effective date of amended rule 47 C.F.R. § 64.1200(a)(3)(i).[3]

2. In the *Report and Order*, the Commission reversed its prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers.[4] The Commission determined that the established business relationship would no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements.[5] Instead, the Commission concluded that the recipient's express invitation or permission must be in writing and include the recipient's signature.[6] The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company to which permission is given, and must provide the individual's or business's fax number to which faxes may be sent.[7]

3. The American Society of Association Executives (ASAE) filed a petition for emergency clarification of the rules governing unsolicited facsimile advertisements as they

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[3] Amended rule 47 C.F.R. § 64.1200(a)(3)(i) provides that "a facsimile advertisement is not 'unsolicited' if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."

[4] *Report and Order* at para. 189.

[5] *Id.*

[6] *Report and Order* at para. 191.

[7] *Id.*

apply to tax-exempt nonprofit organizations.[8] In addition, ASAE filed a petition for stay of the unsolicited facsimile rules as they apply to tax-exempt nonprofits in the event the Commission is unable to clarify the rules prior to their effective date.[9] Many of ASAE's members and other organizations have filed comments in support of ASAE's petitions.[10] The National Association of Realtors also filed a Request for Emergency Stay of all of the facsimile advertisement rules, asking the Commission to grant a one-year stay of the recently adopted rules.[11] A Request for Stay of the amended rules concerning unsolicited facsimile advertising as they apply to the publishers of Requester Publications, along with a Request for Expedited Clarification of the unsolicited facsimile rules, were filed by Proximity Marketing.[12] In addition, a Request for Stay of the amended rules concerning unsolicited facsimile advertising as they apply to political action committees was filed by the National Association of

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[8] ASAE Petition for Emergency Clarification, filed July 25, 2003 (asking the Commission to issue, on an emergency basis, a clarification that unsolicited facsimile communications are not prohibited when issued by tax-exempt nonprofit purposes).

[9] ASAE Petition for Stay, filed July 25, 2003.

[10] *See, e.g.,* Maryland Society of Association Executives Comments; Construction Management Association of America Comments; Pittsburgh Pediatric Society Comments; Albany County Convention and Visitors' Bureau Comments; American Correctional Association Comments.

[11] The National Association of Realtors (NAR) requests that the Commission stay the effective date of the Commission's rules at 64.1200(a)(3), 68.318 and other applicable rules "to permit NAR and its members sufficient time to review and comply with the Commission's new, unanticipated, and unprecedented, unsolicited fax rules." *See* NAR Request for Emergency Stay of Facsimile Advertisement Rules, filed August 1, 2003, p. 1.

[12] Proximity Marketing Request for Stay and Proximity Marketing Request for Expedited Clarification, filed August 6, 2003.

Business Political Action Committees (NABPAC).[13] The Chamber of Commerce of the United States *et al.* filed a Request for Stay of the amended rules that apply to unsolicited commercial faxes.[14] The "Business Users Coalition" submitted a Petition for Emergency Stay of at least six months of the amended rules regarding unsolicited facsimile advertisements.[15] A Petition for Stay of the rules governing the nature of "express permission" required to send advertisements by fax was filed by American Business Media.[16] A Petition for Emergency Stay & Clarification of the amended rules governing unsolicited facsimile advertisements as they apply to tax-exempt nonprofit organizations was submitted by the Air Conditioning Contractors of America (ACCA).[17] A Request for Stay of those rules governing unsolicited fax advertising was filed by the American Dietetic Association

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[13] NABPAC Request for Stay of Facsimile Advertisement Rules, filed August 8, 2003.

[14] The Chamber of Commerce of the United States, the Community Association Institute, the National Association of Manufacturers, the National Association of Wholesaler-Distributors, the National Restaurant Association, and the National Federation of Independent Business Request for Stay of Facsimile Advertisement Rules, filed August 8, 2003.

[15] The American Society of Travel Agents, Mortgage Bankers Association of America, National Association of Mortgage Brokers, Consumer Mortgage Coalition, and the Midwest Circulation Association (collectively "Business Users Coalition") Petition for Emergency Stay, filed August 7, 2003.

[16] American Business Media seeks "a stay pending reconsideration of [the requirement for written and signed permission], a stay pending clarification that notifications to subscribers of subscription expiration and insertion orders to advertisers are not advertisements, a stay for one year in the event that the Commission retains the signature rule and a stay pending judicial review." American Business Media Petition for Stay, filed August 6, 2003.

[17] Air Conditioning Contractors of America (ACCA) Petition for Emergency Stay & Clarification, filed August 12, 2003.

(ADA).[18] Reed Elsevier Inc. submitted a Motion for Stay of the effective date of the amended fax consent rule at 64.1200(a)(3)(i).[19] The Newspaper Association of America (NAA) and the National Newspaper Association (NNA) filed a Petition for Stay of the Commission's amended rules on unsolicited facsimile advertisements.[20]

4. The American Teleservices Association (ATA) has also submitted a Request for Expedited Stay of the Commission's revisions to the rules implementing the TCPA.[21] The ATA requests that the Commission stay the revisions to the rules implementing the TCPA, pending a final decision on judicial review of the new rules. ATA's petition relates primarily to the new telephone solicitation rules, including the national do-not-call registry.

5. We now, on our own motion, issue this limited reconsideration of the effective date of our determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements, as well as the amended unsolicited facsimile provisions at 47 C.F.R. § 64.1200(a)(3)(i). Section 64.1200 (a)(3)(i), as amended, requires the sender of a facsimile advertisement to first obtain from the recipient a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements

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[18] American Dietetic Association Request for Clarification or, in the Alternative, A Stay of the Implementation of Regulations, filed August 6, 2003.

[19] Reed Elsevier Inc. Motion for Stay, filed August 12, 2003.

[20] NAA and NNA Petition for Stay, filed August 8, 2003.

[21] *See* ATA Request for Expedited Stay, filed July 25, 2003.

from the sender.[22] The comments filed after the release of the *Report and Order* indicate that many organizations may need additional time to secure this written permission from individuals and businesses to whom they fax advertisements. We believe that, in light of this new information, the public interest would best be served by allowing senders of such advertisements additional time to obtain such express permission before the new rules become effective. In addition, this extension will allow the Commission the opportunity to consider any petitions for reconsideration and other filings that may be made on this issue.[23] We retain the discretion to extend the effective date further should circumstances warrant such an action.[24]

6. We emphasize that the only effective dates of the Commission's *Report and Order* extended by this Order are: 1) the determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements; and 2) the requirement that the sender of a facsimile advertisement first obtain the recipient's express permission in writing. Therefore, until the amended rule at 47 C.F.R. § 64.1200(a)(3)(i) becomes effec-

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[22] *See* 47 U.S.C. § 227(a)(4) for the definition of "unsolicited advertisement."

[23] Petitions for reconsideration are due on August 25, 2003.

[24] We emphasize that our existing TCPA rules prohibiting the transmission of unsolicited advertisements to a telephone facsimile machine will remain in effect during the pendency of this extension. Under these rules, those transmitting facsimile advertisements must have an established business relationship or prior express permission from the facsimile recipient to comply with our rules. In addition, the effective date of the other amended facsimile rules remains unchanged by this Order. *See, e.g.*, 47 C.F.R. § 68.318(d) (amending the rules to require any fax broadcaster that demonstrates a high degree of involvement in the transmission of messages to be identified on the facsimile, along with the identification of the sender).

tive on January 1, 2005, an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements. The effective date of our amended definition of an "established business relationship" is not affected by our determination here.[25]

7. We have considered and rejected ATA's request to stay the revisions to the rules implementing the TCPA to the extent that such request extends beyond the fax rules discussed above. Although the Commission has declined to adopt a single standard for requests for injunctive relief, we generally consider four criteria: (1) the likelihood of success on the merits, (2) the threat of irreparable harm absent grant of preliminary relief, (3) the degree of injury to other parties if relief is granted, and (4) that a stay will be in the public interest.[26] We conclude that ATA's request does not satisfy the factors governing the issuance of a stay.

8. The actions contained herein have not changed our Final Regulatory Flexibility Analysis (FRFA), which is set forth in the *Report and Order*. Thus, no supplemental FRFA is necessary. In addition, the action contained herein imposes no new or modified reporting and/or recordkeeping requirements or burdens on the public.

9. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 222, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 222 and 227; and Section 1.108 of the Commission's Rules, 47 C.F.R. §§ 1.108, this Order on Reconsideration in CG Docket No.

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[25] *Report and Order* at para 113.

[26] *See Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). *See also Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, PR Docket No. 92-235, 15 FCC Rcd 7051, 7054 at para. 7 (1999).

02-278 IS ADOPTED and that the *Report and Order*, FCC 03-153, IS MODIFIED as set forth herein.

10. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the National Association of Realtors' Request for Emergency Stay IS DISMISSED without prejudice.

11. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the American Society of Association Executives' Petition for Stay IS DISMISSED without prejudice.

12. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that Proximity Marketing's Request for Stay IS DISMISSED without prejudice.

13. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the National Association of Business Political Action Committees' Request for Stay IS DISMISSED without prejudice.

14. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Chamber of Commerce of the United States *et al.* Request for Stay IS DISMISSED without prejudice.

15. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Business Users Coalition's Petition for Emergency Stay IS DISMISSED without prejudice.

16. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the American Business Media's Petition for Stay IS DISMISSED without prejudice.

17. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Air Conditioning Contractors of America's Petition for Emergency Stay IS DISMISSED without prejudice.

18. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the American Dietetic Association's Request for Stay of the Implementation of Regulations IS DISMISSED without prejudice.

19. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that Reed Elsevier Inc.'s Motion for Stay IS DISMISSED without prejudice.

20. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Newspaper Association of America and the National Newspaper Association's Petition for Stay IS DISMISSED without prejudice.

21. IT IS FURTHER ORDERED, that the American Teleservices Association Request for Expedited Stay IS DISMISSED without prejudice to the extent it seeks a stay of the rules affected by the extended effective dates set forth above, but is OTHERWISE DENIED.

22. IT IS FURTHER ORDERED, that the effective date for the Commission's determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements and the requirement that the sender of a facsimile advertisement first obtain the recipient's express permission in writing, as codified at 47 C.F.R. § 64.1200(a)(3)(i), IS January 1, 2005, and that this Order on Reconsideration is effective upon publication in the Federal Register.[27]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[27] In light of the need to allow affected entities time to comply with the new faxing rules, we find good cause, pursuant to 5 U.S.C. § 553(d), to make this effective on less than thirty days' notice.

APPENDIX I

Before the
Federal Communications Commission
Washington, D.C. 20554

CG Docket No. 02-278

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

REPORT AND ORDER

Adopted: June 26, 2003

Released: July 3, 2003

By the Commission: Chairman Powell, Commissioners Abernathy, Copps and Adelstein issuing separate statements.

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I. INTRODUCTION

1. In this Order, we revise the current Telephone Consumer Protection Act (TCPA)[1] rules and adopt new rules to provide consumers with several options for avoiding unwanted telephone solicitations. Specifically, we establish with the Federal Trade Commission (FTC) a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls. The national do-not-call registry will supplement the current company-specific do-not-call rules for those consumers who wish to continue requesting that particular companies not call them. To address the more prevalent use of predictive dialers, we have determined that a telemarketer may abandon no more than three percent of calls answered by a person and must deliver a prerecorded identification message when abandoning a call. The new rules will also require all companies conducting telemarketing to transmit caller identification (caller ID) information, when available, and prohibits them from blocking such information. The Commission has revised its earlier determination that an established business relationship constitutes express invitation or permission to receive an unsolicited fax, and we have clarified when fax broadcasters are liable for the transmission of unlawful facsimile advertisements. We believe the rules the Commission adopts here strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers.

2. It has now been over ten years since the Commission adopted a broad set of rules that respond to Congress's directives in the TCPA. Over the last decade, the telemarketing industry has undergone significant changes in the technologies and methods used to contact consumers. The

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[1] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq*.

Commission has carefully reviewed the record developed in this rulemaking proceeding. The record confirms that these marketplace changes warrant modifications to our existing rules, and adoption of new rules if consumers are to continue to receive the protections that Congress intended to provide when it enacted the TCPA. The number of telemarketing calls has risen steadily; the use of predictive dialers has proliferated; and consumer frustration with unsolicited telemarketing calls continues despite the efforts of the states, the Direct Marketing Association (DMA),[2] and the company-specific approach to the problem. Consumers often feel frightened, threatened, and harassed by telemarketing calls. They are angered by hang-ups and "dead air" calls, by do-not-call requests that are not honored, and by unsolicited fax advertisements. Many consumers who commented in this proceeding "want something done" about unwanted solicitation calls, and the vast majority of them support the establishment of a national do-not-call registry. Congress, too, has responded by enacting the Do-Not-Call Implementation Act (Do-Not-Call Act),[3] authorizing the establishment of a national do-not-call registry, and directing this Commission to issue final rules in its second major TCPA proceeding that maximize consistency with those of the FTC.

3. The Commission recognizes that telemarketing is a legitimate method of selling goods and services, and that many consumers value the savings and convenience it provides. Thus, the national do-not-call registry that we adopt here will only apply to outbound telemarketing calls and will only include the telephone numbers of consumers who

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[2] The Direct Marketing Association (DMA) is a trade association of businesses that advertise their products and services directly to consumers by mail, telephone, magazine, internet, radio or television. *See also infra*, note 47.

[3] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *to be codified at* 15 U.S.C. § 6101 *(Do-Not-Call Act)*.

indicate that they wish to avoid such calls. Consumers who want to receive such calls may instead continue to rely on the company-specific do-not-call lists to manage telemarketing calls into their homes. Based on Congress's directives in the TCPA and the Do-Not-Call Act, the substantial record developed in this proceeding, and on the Commission's own enforcement experience, we adopt these amended rules, as described in detail below.

II. BACKGROUND

A. Telephone Consumer Protection Act of 1991

4. On December 20, 1991, Congress enacted the TCPA in an effort to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety.[4] The statute restricts the use of automatic telephone dialing systems, artificial and prerecorded messages, and telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA provides that:

> It shall be unlawful for any person within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> (i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
>
> (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

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[4] *See TCPA*, Section 2(5), *reprinted in* 7 FCC Rcd 2736 at 2744.

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.[5]

Under the TCPA, those sending fax messages or transmitting artificial or prerecorded voice messages are subject to certain identification requirements.[6] The statute also provides consumers with several options to enforce the restrictions on unsolicited telemarketing, including a private right of action.[7]

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[5] 47 U.S.C. § 227(b)(1).

[6] 47 U.S.C. §§ 227(d)(1)(B) and (d)(3)(A). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609, 4613, para. 6 (1997) (*1997 TCPA Reconsideration Order*), in which the Commission found that "[s]ection 227(d)(1) of the statute mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message and not the entity that transmits the message." (footnotes omitted).

[7] The TCPA permits consumers to file suit in state court if an entity violates the TCPA prohibitions on the use of facsimile machines, automatic telephone dialing systems, and artificial or prerecorded voice messages and telephone solicitation. 47 U.S.C. §§ 227(b)(3) and (c)(5).

5. The TCPA requires the Commission to prescribe regulations to implement the statute's restrictions on the use of autodialers, artificial or prerecorded messages and unsolicited facsimile advertisements.[8] The TCPA also requires the Commission to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights" and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.[9] Specifically, section 227(c)(1) requires the Commission to "compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages."[10] The TCPA specifically authorizes the Commission to "require the establishment and operation of a single national database to compile a list of

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Consumers may recover actual damages or receive up to $500 in damages for each violation, whichever is greater. If the court finds that the entity willfully or knowingly violated the TCPA, consumers may recover an amount equal to not more than three times this amount. 47 U.S.C. § 227(b)(3). Consumers may also bring their complaints regarding TCPA violations to the attention of the state attorney general or an official designated by the state. This state entity may bring a civil action on behalf of its residents to enjoin a person or entity engaged in a pattern of telephone calls or other transmissions in violation of the TCPA. 47 U.S.C. § 227(f)(1). Additionally, a consumer may request that the Commission take enforcement actions regarding violations of the TCPA and the regulations adopted to enforce it. *See* 47 C.F.R. § 1.41 on informal requests for Commission action and 47 C.F.R. § 1.716 on the Commission's process for complaints filed against common carriers.

[8] 47 U.S.C. § 227(b)(2).

[9] 47 U.S.C. § 227(c)(1)-(4).

[10] 47 U.S.C. § 227(c)(1)(A).

telephone numbers of residential subscribers who object to receiving telephone solicitations."[11]

B. TCPA Rules

6. In 1992, the Commission adopted rules implementing the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining do-not-call lists.[12] Pursuant to the Commission's rules, a person or entity engaged in telemarketing is required to maintain a record of a called party's request not to receive future solicitations for a period of ten years.[13] Telemarketers must develop and maintain written policies for maintaining their lists,[14] and they are required to inform their employees of the list's existence and train them to use the list.[15] Commission rules prohibit telemarketers from calling residential telephone subscribers before 8 a.m. or after 9 p.m.[16] and require telemarketers to identify themselves to called parties.[17] As mandated by the TCPA, the Commission's rules also establish general prohibitions against autodialed calls being made without prior express consent to certain locations,

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[11] 47 U.S.C. § 227(c)(3).

[12] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200.

[13] Initially telemarketers were required to honor a do-not-call request indefinitely. The Commission later modified its rules to require that the request be honored for a ten-year period. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397-98, para. 14 (1995) (*1995 TCPA Reconsideration Order*); 47 C.F.R. § 64.1200(e)(2)(vi).

[14] 47 C.F.R. § 64.1200(e)(2)(i).

[15] 47 C.F.R. § 64.1200(e)(2)(ii).

[16] 47 C.F.R. § 64.1200(e)(1).

[17] 47 C.F.R. § 64.1200(e)(2)(iv).

including emergency lines or health care facilities,[18] the use of prerecorded or artificial voice message calls to residences,[19] line seizure by prerecorded messages,[20] and the transmission of unsolicited advertisements by facsimile machines.[21] The TCPA rules provide that facsimile and prerecorded voice transmissions, as well as telephone facsimile machines, must meet specific identification requirements.[22]

7. In 1995 and 1997, the Commission released orders addressing petitions for reconsideration of the *1992 TCPA Order*. In a Memorandum Opinion and Order released on August 7, 1995, the Commission exempted from its TCPA rules calls made on behalf of tax-exempt nonprofit organizations, clarified treatment of debt collection calls, and required telemarketers to honor a do-not-call request for a period of ten years.[23] The Commission also extended its TCPA rules to respond to technical advances in computer-based facsimile modems that enable solicitors to become "fax broadcasters."[24] On April 10, 1997, the Commission issued an Order on Further Reconsideration requiring that all facsimile transmissions contain the identifying information of the business, other entity, or individual creating or originating the facsimile message, rather than the entity that transmits the message.[25]

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[18] 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

[19] 47 C.F.R. § 64.1200(a)(2).

[20] 47 C.F.R. §§ 64.1200(a)(4) and 68.318(c).

[21] 47 C.F.R. § 64.1200(a)(3).

[22] 47 C.F.R. §§ 64.1200(d)(1) and (2); 47 C.F.R. § 68.318(d).

[23] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397-401, paras. 12-19.

[24] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12404-06, paras. 27-31.

[25] *1997 TCPA Reconsideration Order*, 12 FCC Rcd at 4612-13, para. 6. The Commission also "[did] not find anything in the TCPA that would prohibit a facsimile broadcast provider from supplying identification of

C. Marketplace Changes Since 1992

8. The marketplace for telemarketing has changed signify-cantly in the last decade. When the TCPA was enacted in 1991, Congress determined that 300,000 solicitors were used to telemarket goods and services to more than 18 million Americans every day.[26] Congress also found that in 1990 sales generated through telemarketing amounted to $435 billion dollars.[27] Some estimate that today telemarketers may attempt as many as 104 million calls to consumers and businesses every day,[28] and that telemarketing calls generate

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itself and the entity originating a message if it arranges with the message sender to do so." *Id.* at 4613, para. 6.

[26] *See TCPA,* Section 2(3), *reprinted in* 7 FCC Rcd 2736 at 2744.

[27] *See TCPA*, Section 2(4), *reprinted in* 7 FCC Rcd 2736 at 2744.

[28] In attempting to estimate the number of outbound marketing calls made each day in the United States, representatives of the Direct Marketing Association (DMA) have stated that, with as many as 1 million telemarketing representatives making 13 calls an hour, working 8 hours a day, it is possible that 104 million outbound calls are made to businesses and consumers every day. They noted that, of these calls, as many as 41% of them may be abandoned (because they get busy signals, no answer, hang-ups, or answering machines). *See* transcript from FTC Do-Not-Call Forum, Testimony of Jerry Cerasale, DMA, June 6, 2002 at 68. Another study presented to the FTC during its proceeding, estimates that the annual number of outbound calls that are answered by a consumer is 16,129,411,765 (*i.e.*, 16 billion calls). This figure does not include those calls that are abandoned. James C. Miller, III, Jonathan S. Bowater, Richard S. Higgins, and Robert Budd, "An Economic Assessment of Proposed Amendments to the Telemarketing Sales Rule," June 5, 2002 at 28, Att. 1 (prepared for the Consumer Choice Coalition and its members, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation). *See Telemarketing Sales Rule, Final Rule,* Federal Trade Commission, 68 Fed. Reg. 4580 at 4629-30, n.591 (Jan. 29, 2003) *(FTC Order).*

over $600 billion in sales each year.[29] The telemarketing industry is considered the single largest direct marketing system in the country, representing 34.6% of the total U.S. sales attributed to direct marketing.[30] The number of telemarketing calls, along with the increased use of various technologies to contact consumers, has heightened public concern about unwanted telemarketing calls and control over the telephone network. Autodialers can deliver prerecorded messages to thousands of potential customers every day. Predictive dialers,[31] which initiate phone calls while telemarketers are talking to other consumers, frequently abandon calls before a telemarketer is free to take the next call.[32] Using

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[29] This figure represents telemarketing sales to consumers and businesses. *See* Seth Stern, "Will feds tackle telemarketers?" (April 15, 2002) <http://www.csmonitor.com/2002/0415/p16s01-wmcn.html> (citing Direct Marketing Association statistics).

[30] *See* "The Economic Impact of Direct Marketing by Telephone," a study presented by Direct Marketing Association Telephone Marketing Council, <http://www.third-wave.net/economics.htm> (visited July 3, 2002).

[31] A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers the phone only to hear "dead air" because no telemarketer is free to take the call. *See Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492 at 4522 (January 30, 2002) (*FTC Notice*).

[32] Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate (*i.e.*, the percentage of hang-up calls the system will allow). The higher the abandonment rate, the higher the number of hang-up calls. High abandonment rates increase the probability that a customer will be on the line when the telemarketer finishes each call. It also, however, increases the likelihood that the telemarketer will still be on a previously placed call and not be available

predictive dialers allows telemarketers to devote more time to selling products and services rather than dialing phone numbers, but the practice inconveniences and aggravates consumers who are hung up on. Despite a general ban on faxing unsolicited advertisements,[33] and aggressive enforcement by the Commission,[34] faxed advertisements also have proliferated, as facsimile service providers (or "fax broadcasters") enable sellers to send advertisements to multiple destinations at relatively little cost. These unsolicited faxes impose costs on consumers, result in substantial inconvenience and disruption, and also may have serious implications for public safety.[35]

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when the consumer answers the phone, resulting in "dead air" or a hang-up. *See FTC Notice*, 67 Fed. Reg. at 4523.

[33] 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(3).

[34] The Commission or the Commission's Enforcement Bureau have issued forfeiture orders totaling $1.56 million for violations of the TCPA's prohibition on unsolicited fax advertisements. The Commission has also proposed a $5,379,000 forfeiture against a fax broadcaster. *See Fax.com, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15927 (2002) *(Fax.com NAL), stayed Missouri v. American Blast Fax*, No. 4:00CV933SNL (E.D. Mo. Aug. 29, 2002). The Enforcement Bureau has also issued 189 citations for such prohibited faxes. For a description of the Commission's enforcements actions involving the TCPA, *see* <http://www.fcc.gov/eb/tcd/working.html>. Under section 503 of the Act, the Commission is required in an enforcement action to issue a warning citation to any violator that does not hold a Commission authorization. Only if the non-licensee violator subsequently engages in conduct described in the citation may the Commission propose a forfeiture, and the forfeiture may only be issued as to the subsequent violations. *See* 47 U.S.C. §§ 503(b)(5), (b)(2)(C).

[35] *See, e.g., Fax.com NAL*, 17 FCC Rcd at 15932-33, para. 9, which describes a medical doctor's complaint about unsolicited fax advertisements he received on a line that is reserved for the receipt of patient medical data.

D. FTC National Do-Not-Call Registry and Telemarketing Rules

9. In response to these changes in the marketplace, the FTC recently amended its own rules to better protect consumers from deceptive and abusive telemarketing practices, including those that may be abusive of consumers' interest in protecting their privacy. On December 18, 2002, the FTC released an order adopting a national do-not-call registry to be maintained by the federal government to help consumers avoid unwanted telemarketing calls. In that order, the FTC also adopted other changes to its Telemarketing Sales Rule (TSR), which are based on its authority under the 1994 Telemarketing Consumer Fraud and Abuse Prevention Act.[36] The FTC's amended TSR supplements its current company-specific do-not-call rules with a provision allowing consumers to stop unwanted telemarketing calls by registering their telephone numbers with a national do-not-call registry at no cost. Telemarketers will be required to pay fees to access the database and to "scrub" their calling lists of the telephone numbers in the database.[37] The FTC's list will not cover those entities over which it has no jurisdiction, including common carriers, banks, credit unions, savings and loans, companies engaged in the business of insurance, and airlines.[38] It also

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[36] *See FTC Order*, 68 Fed. Reg. at 4580. The FTC adopted its Telemarketing Sales Rule, 16 C.F.R. Part 310, on August 16, 1995, pursuant to the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act), 15 U.S.C. §§ 6101-6108. The Telemarketing Act, which was signed into law on August 16, 1994, directed the FTC to issue a rule prohibiting deceptive and abusive telemarketing acts or practices. *FTC Notice*, 67 Fed. Reg. at 4492-93.

[37] "Scrubbing" refers to comparing a do-not-call list to a company's call list and eliminating from the call list the telephone numbers of consumers who have registered a desire not to be called.

[38] Despite these jurisdictional limitations, the FTC stated that it can reach telemarketing activity conducted by non-exempt entities. Therefore, it maintains that when an exempt financial institution, telephone company,

will not apply to intrastate telemarketing calls. In addition, the FTC concluded that nonprofit organizations are not subject to the national do-not-call list; however, they must, when using for-profit telemarketers, comply with the company-specific do-not-call rules.[39]

10. The FTC indicated in its order that it does not intend the national do-not-call registry to preempt state do-not-call laws. Instead, it will allow all states, and the DMA if it so desires, to download into the national registry the telephone numbers of consumers on their lists. The FTC anticipates a relatively short transition period leading to one harmonized registry, and said that it will work with the states to coordinate implementation, minimize duplication, and maximize efficiency for consumers.[40] The FTC has also announced that online registration for the do-not-call registry will be available nationwide on or around July 1, 2003. Telephone registration will be open on the same date for consumers in states west of the Mississippi River and open to the entire

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insurance company, airline, or nonprofit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the amended TSR, then that campaign is subject to the provisions of the TSR. *See FTC Order*, 68 Fed. Reg. 4580 at 4587.

[39] The FTC's national do-not-call registry and other amendments to the TSR have been challenged on grounds that a national do-not-call registry violates the First Amendment and that the FTC exceeded its statutory authority under the Telemarketing Consumer Fraud and Abuse Prevention Act. *See Mainstream Marketing Services, Inc. v. FTC*, No. 03-N-0184 (D. Colo. filed Jan. 29, 2003). *See also U.S. Security et al v. FTC*, Civ. No. 03-122-W (W.D. Okla. filed Jan. 29, 2003). On March 26, 2003, the U.S. District Court for the Western District of Oklahoma denied plaintiffs' Motion for Preliminary Injunction of the FTC's abandoned call rules, stating that plaintiffs "have failed to show a substantial likelihood that they will prevail on the merits of their challenges to the Final Rule." *See U.S. Security et al. vs. FTC*, No. Case CIV-03-122-W (W.D. Okla. March 26, 2003).

[40] *See FTC Order*, 68 Fed. Reg. 4580 at 4641.

country on July 8, 2003. On October 1, 2003, the FTC and the States will begin enforcing the national do-not-call provisions of the amended TSR.[41]

11. The FTC also adopted new rules on the use of predictive dialers and the transmission of caller ID information. The amended TSR prohibits telemarketers from abandoning any outbound telephone call, and provides in a safe harbor provision, that to avoid liability, a telemarketer must, among several other requirements, abandon no more than three percent of all calls answered by a person.[42] Telemarketers will also be required to transmit the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service.[43]

E. State Do-Not-Call Lists

12. A growing number of states have also adopted or are considering legislation to establish statewide do-not-call lists. To date, 36 states have passed "do-not-call" statutes, [44] and

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[41] *See* FTC press materials at <http://www.ftc.gov/opa/2003/06/dncaccelerated.htm> (accessed June 3, 2003).

[42] *See FTC Order*, 68 Fed. Reg. 4580 at 4641-45; 16 C.F.R. §§ 310.4 (b)(1)(iv) and 310.4(b)(4).

[43] *See FTC Order*, 68 Fed. Reg. 4580 at 4623-28; 16 C.F.R. § 310.4 (a)(7).

[44] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin and Wyoming have no-call laws. Of these states, Connecticut, Maine, Michigan, Pennsylvania, Vermont, and Wyoming require telemarketers to use the DMA's Telephone Preference Service (TPS) list. *See infra* note 47. Alaska's statute requires telephone companies to place a black dot in the telephone directory by the names of consumers who do not wish to receive telemarketing calls.

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numerous others have considered similar bills.[45] Consumers remain enthusiastic about do-not-call lists, as they continue to register their telephone numbers with state lists.[46] State do-not-call lists vary in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions. Some state statutes provide for state-managed do-not-call lists, while others require telemarketers to use the Direct Marketing Association's Telephone Preference Service.[47] In some states, residents can register for

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[45] States that are considering laws to create state-run do-not-call lists are Delaware, District of Columbia, Hawaii, Iowa, Maryland, Michigan, Nebraska, Nevada, North Carolina, Ohio, Rhode Island, South Carolina, Washington, and West Virginia.

[46] In Indiana, more than 1,000,000 residential telephone numbers have been submitted to the State's do-not-call list. In Missouri, more than 1,000,000 residential telephone numbers are now enrolled in the State's do-not-call database, placing approximately 40% of the State's households on that State's do-not-call list. In Tennessee, 762,000 telephone numbers have been registered, representing an estimated 33% of all households. In New York, the number of residential telephone numbers enrolled on that State's do-not-call list is nearly 2 million. Connecticut's do-not-call list contains nearly 400,000 telephone numbers, and Georgia's is nearing 360,000. Colorado has 977,000 registered phone numbers, almost half of the number of residential phone lines in the state. Texas has more than 782,000 registered phone lines. Kentucky has 740,000 registered phone lines, representing 46% of Kentucky residents. The Kansas list contains more than 367,000 phone lines. Approximately 1,600,000 residents enrolled in Pennsylvania's registry in less than six weeks. *See* NAAG Comments at 6, n.5.

[47] *See, e.g.*, Wyoming (Wyo. Stat. Ann. § 40-12-301) and Maine (Me. Rev. Stat. Ann. tit. 32, § 14716 (2003). Established in 1985, the DMA's Telephone Preference Service (TPS) is a list of residential telephone numbers for consumers who do not wish to receive telemarketing calls. The DMA requires its members to adhere to the list. Telemarketers who are not members of DMA are not required to use the list, but may purchase the TPS for a fee. *See* <http://www.dmaconsumers.org/offtelephonelist.html> (accessed April 8, 2003).

the do-not-call lists at no charge.[48] In others, telephone subscribers must pay a fee. For example, Georgia requires its residents to pay $5 to place their phone numbers on the do-not-call list for a period of two years.[49] To register with the Texas do-not-call list, residents must pay $2.25 for three years.[50] In most states, telemarketers must pay to access the state do-not-call list if they wish to call residents in that state; however, such access fees vary from state to state. In Oregon, telemarketers must pay $120 per year to obtain the state do-not-call list;[51] in Missouri, the fee is $600 per year, although telemarketers can pay less if they want only numbers from certain area codes.[52] The state "do-not-call" statutes provide varying exceptions to their requirements.

13. As state legislatures continue to consider their own do-not-call laws, others have, in anticipation of the national do-not-call registry, begun the process of harmonizing their lists with the national list. The Illinois legislature, for example, passed a bill to reconcile differences between the state and federal no-call laws. The measure would make the FTC's national no-call list the official state list for Illinois and would direct the Illinois Commerce Commission to work with local exchange providers on how to inform consumers about the existence of the list.[53] California's Attorney General's office

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[48] *See, e.g.*, Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Missouri (Mo. Rev. Stat. § 407.1098); and Tennessee (Tenn. Code Ann. § 65-4-404 (2002)); *see also* rules at Tenn. Comp. R & Regs. Chap. 1220-4-11).

[49] *See* Ga. Code Ann. § 46-5-27 (2002); *see also* rules at Ga. Comp. R & Regs. R. 515-14-1.

[50] *See* H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001.

[51] *See* Or. Rev. Stat. § 646.574.

[52] *See* Mo. Rev. Stat. § 407.1098.

[53] *See* Illinois H.B. 3407.

is allowing residents to pre-register for the national registry on the internet, and says it will deliver the pre-registered California telephone numbers to the FTC as soon as it is ready to receive them.[54] The FTC indicated in its order that it will take some time to harmonize the various state do-not-call registries with the national registry.[55] While some states will be able to transfer their state "do-not-call" registration information by the time telemarketers first gain access to the national registry, other states may need from 12 to 18 months to achieve those results.[56]

F. Notice of Proposed Rulemaking

14. On September 18, 2002, the Commission released a Memorandum Opinion and Order and Notice of Proposed Rulemaking seeking comment on whether the Commission's rules need to be revised in order to carry out more effectively Congress's directives in the TCPA.[57] Specifically, we sought comment on whether to revise or clarify our rules governing unwanted telephone solicitations[58] and the use of automatic telephone dialing systems,[59] prerecorded or artificial voice messages,[60] and telephone facsimile machines.[61] We also

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[54] *See* <http://nocall.doj.state.ca.us/> (accessed April 8, 2003).

[55] *See FTC Order*, 68 Fed. Reg. 4580 at 4641.

[56] *See* FTC Order, 68 Fed. Reg. 4580 at 4641.

[57] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking (NPRM) and Memorandum Opinion and Order (MO&O), 17 FCC Rcd 17459, CG Docket No. 02-278 and CC Docket No. 92-90 (2002) *(2002 Notice)*. In the MO&O, the Commission closed and terminated CC Docket No. 92-90 and opened a new docket to address the issues raised in this proceeding.

[58] *2002 Notice*, 17 FCC Rcd at 17468-71, paras. 13-17.

[59] *2002 Notice*, 17 FCC Rcd at 17473-76, paras. 23-27.

[60] *2002 Notice*, 17 FCC Rcd at 17477-81, paras. 30-35.

[61] *2002 Notice*, 17 FCC Rcd at 17482-84, paras. 37-40.

sought comment on the effectiveness of company-specific do-not-call lists.[62] In addition, we sought comment on whether to revisit the option of establishing a national do-not-call list[63] and, if so, how such action might be taken in conjunction with the FTC's proposal to adopt a national do-not-call list and with various state do-not-call lists.[64] Lastly, we sought comment on the effect proposed policies and rules would have on small business entities, including *inter alia* those that engage in telemarketing activities and those that rely on telemarketing as a method to solicit new business.[65] Following the FTC's announcement that it had amended its TSR, the Commission extended the reply comment period in this proceeding to ensure that all interested parties had ample opportunity to comment on possible Commission action in light of the FTC's new rules.[66]

G. Do-Not-Call Implementation Act

15. On March 11, 2003, the Do-Not-Call Act was signed into law, authorizing the FTC to collect fees from telemarketers for the implementation and enforcement of a do-not-call registry. The Do-Not-Call Act also requires the FCC to issue a final rule in its ongoing TCPA proceeding within 180 days of enactment, and to consult and coordinate with the FTC to "maximize consistency" with the rule promulgated by the FTC. Congress recognized that because the FCC is bound by

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[62] *2002 Notice*, 17 FCC Rcd at 17468-71, paras. 13-17.

[63] *2002 Notice*, 17 FCC Rcd at 17487-96, paras. 49-66.

[64] *See FTC Notice*, 67 Fed. Reg. 4492 and *FTC Order*, 68 Fed. Reg. 4580.

[65] *2002 Notice*, 17 FCC Rcd at 17497-501, paras. 70-80.

[66] On December 20, 2002, the Commission extended its reply comment period until January 31, 2003. *See Consumer & Governmental Affairs Bureau Announces An Extension of Time To File Reply Comments on the Telephone Consumer Protection Act (TCPA) Rules*, Public Notice, DA 02-3554 (rel. Dec. 20, 2002).

the TCPA, it would not be possible for the FCC to adopt rules that are identical to those of the FTC in every instance.[67] In those instances where such inconsistencies exist, Congress stated that either the FTC or FCC must address them administratively or Congress must address them legisla-tively.[68] The FTC's recent rule changes expand that agency's regulation of telemarketing activities and require coordination to ensure consistent and non-redundant federal enforcement. The FCC's jurisdiction over telemarketing practices, how-ever, is significantly broader than the FTC's. The FCC staff intends to negotiate a Memorandum of Understanding be-tween the respective agencies to achieve an efficient and effective enforcement strategy that will promote compliance with federal regulations. The FCC is required to report to Congress within 45 days after the issuance of final rules in this proceeding, and annually thereafter.[69] The Commission released a Further Notice of Proposed Rulemaking on March 25, 2003, seeking comment on the Do-Not-Call Act's requirements.[70] By this Order, we are complying with Congress's directives to issue final rules in our TPCA proceeding within 180 days of the Do-Not-Call Act's enactment. Furthermore, we have consulted and coordinated

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[67] *See* H.R. REP. No. 108-8 at 4 (2003), *reprinted in* 2003 U.S.C.C.A.N. 688, 671.

[68] *Id.*

[69] The Do-Not-Call Act provides that the FTC and FCC shall each transmit a report to Congress which shall include: "(1) an analysis of the telemarketing rules promulgated by both the Federal Trade Commission and the Federal Communications Commission; (2) any inconsistencies between the rules promulgated by each such Commission and the effect of any such inconsistencies on consumers, and persons paying for access to the registry; and (3) proposals to remedy any such inconsistencies." *See* Do-Not-Call Act, Sec. 4(a).

[70] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Further Notice of Proposed Rulemaking, FCC 03-62 (rel. March 25, 2003) *(Further Notice).*

with the FTC to adopt a national do-not-call list and other telemarketing rules that maximize consistency with the FTC's amended Telemarketing Sales Rule.[71] Pursuant to the requirements of the Do-Not-Call Act, the Commission will note the remaining inconsistencies between the FCC and FTC rules in the report to Congress. The Commission will also continue to work, within the framework of the TCPA, to maximize consistency with the FTC's rules.

III. NATIONAL DO-NOT-CALL LIST

A. Background

16. *Section 227.* The TCPA requires the Commission to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object.[72] In so doing, section 227(c)(1) directs the Commission to "compare and evaluate alternative methods and procedures" including the use of electronic databases and other alternatives in protecting such privacy rights.[73] Pursuant to section 227(c)(3), the Commission "may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."[74] If the Commission determines that adoption of a national database is warranted, section 227(c)(3) enumerates a number of specific

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[71] *See* Comments filed by the FTC in response to the Commission's *Further Notice*. *See also* NARUC Winter Committee Meetings, February 23-26, 2003, at which FCC and FTC staff discussed the national do-not-call registry and ways to harmonize federal and state programs; Letter from James Bradford Ramsay, NARUC General Counsel, to FCC filed March 14, 2003 (NARUC *ex parte*).

[72] 47 U.S.C. § 227(c)(1).

[73] 47 U.S.C. § 227(c)(1)(A).

[74] 47 U.S.C. § 227(c)(3).

statutory requirements that must be satisfied.[75] Additionally, section 227(c)(4) requires the Commission to consider the different needs of telemarketers operating on a local or regionnal basis and small businesses.[76] In addition to our general authority over interstate communications, section 2(b) of the Communications Act specifically provides the Commission with the authority to apply section 227 to intrastate communications.[77]

17. *TCPA Order and 2002 Notice.* The Commission initially considered the possibility of adopting a national do-not-call database in the 1992 *TCPA Order*. At that time, the Commission declined to adopt a national do-not-call registry citing concerns that such a database would be costly and difficult to establish and maintain in a reasonably accurate form.[78] The Commission noted that frequent updates would be required, regional telemarketers would be forced to purchase a national database, costs might be passed on to consumers, and the information compiled could present problems in protecting consumer privacy. The Commission opted instead to implement an alternative approach requiring commercial telemarketers to maintain their own company-specific lists of consumers who do not wish to be called.[79]

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[75] *See* 47 U.S.C § 227(c)(3)(A)-(L).

[76] 47 U.S.C. § 227(c)(4).

[77] 47 U.S.C. § 152(b). *See also Texas v. American Blast Fax*, 121 F. Supp. 2d 1085 at 1087-89 (W.D. Tex. 2000), *Minnesota v. Sunbelt Communications and Marketing*, Civil No. 02-CV-770 (D. Minn. Sept. 4, 2002).

[78] *1992 TCPA Order*, 7 FCC Rcd at 8760, para. 14. At that time commenters estimated the start-up and operational costs for a national database in the first year could be as high as $80 million. *Id.* at 8758, para. 11.

[79] *See infra* paras. 86-96 for a discussion of the company-specific do-not-call requirements.

18. In the *2002 Notice*, the Commission sought comment on whether to revisit its 1992 determination not to adopt a national do-not-call list.[80] As evidenced by the persistent consumer complaints regarding unwanted telephone solicitations, the Commission concluded that the time was ripe to revisit this issue as part of its overall review of the TCPA rules.[81] In so doing, the Commission noted that the increasing number of telemarketing calls over the last decade, along with the increased use of various technologies, such as predictive dialers, to contact consumers, has heightened public concern about unwanted telemarketing calls and control over the telephone network.[82] The Commission also noted that technological innovations may make the creation and maintenance of a national do-not-call database more viable than in the past. Therefore, the Commission sought comment on whether a national do-not-call list should be adopted and, if so, how such a list could be implemented in the most efficient and effective manner for consumers, businesses, and regulators. The Commission noted that a national list would provide consumers with a one-step method for preventing unwanted telemarketing calls. This option could be less burdensome for consumers than repeating requests on a case-by-case basis, particularly in light of the number of entities that conduct

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[80] *2002* Notice, 17 FCC Rcd at 17487-96, paras. 49-66. On December 20, 2002, the Commission extended its reply comment period to allow parties an opportunity to comment on the FTC's order establishing a national do-not-call database for those entities over which it has jurisdiction. *See Consumer & Governmental Affairs Bureau Announces An Extension of Time To File Reply Comments on the Telephone Consumer Protection Act (TCPA) Rules*, Public Notice, DA 02-3554 (rel. Dec. 20, 2002).

[81] *2002 Notice*, 17 FCC Rcd at 17487-88, para. 49 (also noting that the FTC had received over 40,000 comments in response to its Notice on telemarketing).

[82] *2002 Notice*, 17 FCC Rcd at 17464, para. 7, n.34 (citing estimate that as many as 104 million outbound calls are made every day).

telemarketing today. In particular, the Commis-sion sought comment on: (1) whether the cost, accuracy, and privacy concerns noted in 1992 remain relevant today; (2) the effectiveness of the company-specific list in protecting consumer privacy rights; (3) changes in the technology or the marketplace that might influence this analysis; (4) the constitutionality of a national database; (5) satisfying the statutory requirements of section 227(c); and (6) the potential relationship of a national database with the FTC's proposed rules and various state-adopted do-not-call registries.[83]

19. The issues relating to the adoption and implementation of a national do-not-call registry generated extensive comment from consumers, businesses, and state governments. Individual consumers and consumer interest groups overwhelmingly support the adoption of a national do-not-call list.[84] In fact, several commenters support more restrictive alternatives such as adopting an "opt-in" list for those consumers that wish to receive telephone solicitations.[85] Commenters supporting a national do-not-call list cite the numerous and increasing receipt of unwanted telephone solicitation calls; inadequacies of the company-specific approach due to the failure of many telemarketers to honor do-not-call requests or, the impossibility of relaying such requests in the case of "dead air" or hang-up calls initiated by predictive dialers; the burdens of making do-not-call requests for every such call, particularly on the elderly and individuals with disabilities; and the costs imposed on consumers in acquiring technologies to reduce the number of unwanted

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[83] *See 2002 Notice*, 17 FCC Rcd at 17487-96, paras. 49-66.

[84] *See, e.g.*, Maureen Matthews Comments; Gloria Toso Comments; Shirley A. Weaver Comments. *See also* ACUTA Comments at 2; NACAA Comments at 2; Telecommunications for the Deaf Comments at 4; NJ Ratepayer Further Comments at 2.

[85] *See, e.g.*, EPIC Comments at 2-5; Private Citizens, Inc. Comments at 3; Teresa Wilkie Comments; Benjamin Philip Johnson Comments.

calls.[86] Many such commenters argue that unwanted telephone solicitations have reached the point of harassment that constitutes an invasion of privacy within their homes.[87] Others indicate that consumers are often frightened by dead-air and hang-up calls generated by predictive dialers believing they are being stalked.[88] Several consumers indicate that they no longer answer their telephones or they disconnect the phone during the day to avoid telemarketing calls. These commenters support the adoption of a one-step option for those consumers that desire to reduce the number of unwanted solicitation calls that they receive each day.

20. Many consumers indicate that their state lists have reduced the number of unwanted calls that they receive and express concern that any federal do-not-call registry not undermine the protections afforded by the state do-not-call laws.[89] Assuming that a national do-not-call database is adopted, commenters encourage the Commission to work closely with the FTC to adopt a single national registry that operates as consistently and efficiently as possible for all

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[86] *See, e.g.*, Terry L. Krodel Comments (disabled individual has difficulty answering phone); Brian Lawless (contends that consumers should not be forced to pay additional charges to stop telemarketing calls); J. Raymond de Varona Comments (telemarketers hang up when he requests to be added to do-not call list); Mandy Burkart Comments (elderly grandmother targeted by telemarketers). *See also* AARP Comments at 1 (noting that elderly consumers are often the subject of telemarketing fraud).

[87] *See, e.g.*, Emily Malek Comments; Lester D. McCurrie Comments; Andrea Sattler Comments; Sandra S. West Comments (receives as many as 20 telemarketing calls per day).

[88] Edwin Bailey Hathaway Comments; Cynthia Stichnoth Comments.

[89] *See, e.g.*, Brenda J. Donat Comments (cancer patient appreciates reduction in calls due to Indiana Telephone Privacy Act); Alice and Bill Frazee Comments; Tammy Puckett Comments (Indiana law provides quiet for terminally ill family member).

interested parties.[90] State regulators generally support a national data-base provided that it does not preempt state do-not-call rules or preclude the states from enforcing these laws.[91]

21. Industry representatives generally oppose the adoption of a national do-not-call database, but some support this approach provided the Commission adopts an established business relationship exemption and preempts state lists.[92] These commenters contend that the concerns noted by the Commission in 1992, including the costs, accuracy, and privacy issues involved in creating and maintaining such a database remain valid today.[93] In addition, industry commenters argue that a national do-not-call database is not necessary because the current rules are sufficient to protect consumer privacy rights.[94] Several note the economic importance of telemarketing and indicate that a national registry would have severe economic consequences for their

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[90] *See, e.g.*, Verizon Comments at 2; Bank of America Further Comments at 2.

[91] *See, e.g.*, NAAG Comments at 8-13; New York State Consumer Protection Board Comments at 7; Ohio PUC Comments at 3-7; Texas PUC Comments at 10.

[92] *See, e.g.*, Bank of America Comments at 2-4 (endorse national list provided it establishes a uniform national standard and retains established business relationship); Cox Enterprises Comments at 4-9 (would not oppose national list if established business relationship exemption is retained); Sprint Comments at 11-12 (state lists should be preempted); Verizon Wireless Comments at 4-6 (support national list if state lists preempted and established business relationship retained). *See also* DMA Further Comments at 3 (should preempt states); DirectTV Further Comments at 3 (preempt); Nextel Further Comments at 8.

[93] *See, e.g.*, MBA Comments at 2; NAII Comments at 2; SBC Comments at 6; WorldCom Comments at 17.

[94] *See, e.g.*, ABA Comments at 7; BellSouth Reply Comments at 5.

industry.[95] Several industry representatives request specific exemptions from the national do-not-call requirements for newspapers, magazines, insurance companies and small businesses.[96] These commenters contend that they provide valuable goods or services to the public and that telemarketing is the most cost-effective means to promote those services.[97] Representatives of various non-profit organizations oppose any extension of the national do-not-call rules to their organizations.[98] Several commenters argue that a national registry would impose an unconstitutional restriction on commercial speech.[99] They urge more stringent enforcement of the Commission's current rules.

22. *FTC Order*. On December 18, 2002, the FTC released an order establishing a national do-not call registry.[100] The FTC cited an extensive record that revealed that the current rules on telemarketing were not sufficient to protect consumer privacy. The FTC's do-not-call rules provide several options for consumers to manage telemarketing calls—one of which is to allow consumers who do not want to receive telephone solicitation calls to register their telephone number with a national do-not-call database.[101] The FTC indicates that

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[95] *See, e.g.*, Dial America Comments at 15-18; Technion Comments at 3-4; Vector Comments at 14-15.

[96] *See, e.g.*, MPA Comments at 13-14; NAA Comments at 12-14; Seattle Times Comments at 2; Vector Comments at 14-15.

[97] *See, e.g.*, MPA Comments at 4, 13-14; NAA Comments at 13; PLP Comments at 1.

[98] *See, e.g.*, March of Dimes Comments at 2; Leukemia and Lymphoma Society Comments; Special Olympics Hawaii Comments at 2.

[99] *See, e.g.*, ATA Comments at 58-91; SBC Comments at 6, 16-17; WorldCom Comments at 19-30.

[100] *See FTC Order*, 68 Fed. Reg. at 4628-33.

[101] The FTC has awarded a contract to AT&T Government Solutions for $3.5 million to create the national registry of consumers who do not want to be contacted by telemarketers.

consumers may do so at no cost by two methods: either through a toll-free call from the phone number that they wish to register or over the Internet.[102] Consumer registrations will remain valid for a period of five years, with the registry purged on a monthly basis of numbers that have been disconnected or reassigned. Each seller engaged in tele-marketing or on whose behalf telemarketing is conducted will be required to pay an annual fee for access to the database based on the number of area codes of data that the company wishes to access.[103] The only consumer information that telemarketers will receive from the national registry is the registrants' telephone numbers. The FTC's rules prohibit the sale, purchase, rental, lease, or use of the national registry for any purpose other than compliance with the do-not-call provision.[104]

23. The FTC's national do-not-call rules will not apply to those entities over which it has no jurisdiction, including common carriers, banks, insurance companies, and airlines. The FTC rules also will not apply to intrastate telemarketing calls. In addition, the FTC exempts certain types of calls from

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[102] The FTC indicates that calls will be answered by an Interactive Voice Response (IVR) system. Consumers will be directed to enter their telephone numbers. That number will then be checked against an automatic number information (ANI) that is transmitted with the call. Consumers will also be able to verify or cancel their registration in the same way. *See FTC Order*, 68 Fed. Reg. at 4638-39.

[103] As discussed herein, the terms "seller" and "telemarketer" may refer to the same entity or separate entities. The "telemarketer" is the entity that actually initiates the telephone call. The "seller" is the entity on whose behalf the telephone call is being made. *See* amended 47 C.F.R. § 64.1200(f)(5) and (6). Sellers may often hire telemarketing entities to contact consumers on their behalf. *See* amended 47 C.F.R. § 64.1200(f)(7) for the definition of "telemarketing." Pursuant to the FTC's do-not-call program, each seller must pay for access to the do-not-call database. Thus, telemarketing entities cannot share do-not-call data among various client sellers.

[104] *See* 16 C.F.R. § 310.4(b)(2).

the national do-not-call provisions. Specifically, the FTC has established exemptions for calls made by or on behalf of charitable organizations,[105] calls to consumers with whom the seller has an "established business relationship"[106] (as long as the consumer has not asked to be placed on the seller's company-specific do-not-call list), and calls to businesses. The FTC also decided to retain the provision of its rules that allows sellers to obtain the express agreement of consumers who wish to receive calls from that seller. The FTC requires that such express agreement be evidenced by a signed, written agreement. As a result, consumers registered on the national do-not-call list may continue to receive calls from those sellers that have acquired their express agreement. The FTC also adopted a "safe harbor" from liability under its do-not-call provisions concluding that sellers or telemarketers that have made a good faith effort to provide consumers with an opportunity to exercise their do-not-call rights should not be liable for violations that result from an error.[107] The FTC clarified that because wireless subscribers are often charged for the calls they receive, they will be allowed to register

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[105] The FTC has concluded, however, that calls on behalf of charitable organizations will be subject to the company specific do-not-call provisions. *See FTC Order*, 68 Fed. Reg. at 4629.

[106] The FTC defines an "established business relationship" as a relationship between a seller and consumer based on: (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the *eighteen* months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the *three* months immediately preceding the date of a telemarketing call. 16 C.F.R. § 310.2(n). Regarding the interplay between the established business relationship and do-not-call rules, the FTC concluded that if the consumer continues to do business with the seller after asking not to be called, the consumer cannot be deemed to have waived their company-specific do-not-call request. *FTC Order*, 68 Fed. Reg. at 4634.

[107] *See* 16 C.F.R. § 310.4(b)(3).

their wireless telephone numbers on the national do-not-call database.

24. The FTC concluded that it does not intend its rules establishing a national do-not-call registry to preempt state do-not-call laws. The FTC indicated its desire to work with those states that have enacted such laws, as well as this Commission, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to one harmonized registry system. The FTC has articulated a goal whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that they do not contravene consumer requests not to be called.[108]

B. Discussion

25. As discussed in greater detail below, we conclude that the record compiled in this proceeding supports the establishment of a single national database of telephone numbers of residential subscribers who object to receiving telephone solicitations. Consistent with the mandate of Congress in the Do-Not-Call Act, the national do-not-call rules that we establish in this order "maximize consistency" with those of the FTC.[109] The record clearly demonstrates widespread consumer dissatisfaction with the effectiveness of the current rules and network technologies available to protect

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[108] *FTC Order*, 68 Fed. Reg. at 4638-41.

[109] *See also* H.R. REP. NO. 108-8 at 3 (2003), reprinted in 2003 U.S.C.C.A.N. 688, 670 ("[i]t is the strongly held view of the Committee that a national do-not-call list is in the best interest of consumers, businesses and consumer protection authorities. This legislation is an important step toward a one-stop solution to reducing telemarketing abuses.").

consumers from unwanted telephone solicitations.[110] Indeed, many consumers believe that with the advent of such technologies as predictive dialers that the vices of telemarketing have become inherent, while its virtues remain accidental. We have compared and evaluated alternative methods to a national do-not-call list for protecting consumer privacy rights and conclude that these alternatives are costly and/or ineffective for both telemarketers and consumers.[111]

26. A national do-not-call registry that is supplemented by the amendments made to our existing rules will provide consumers with a variety of options for managing telemarketing calls. Consumers may now: (1) place their number on the national do-not-call list; (2) continue to make do-not-call requests of individual companies on a case-by-case basis; and/or (3) register on the national list, but provide specific companies with express permission to call them. Telemarketers may continue to call individuals who do not place their numbers on a do-not-call list and consumers with whom they have an established business relationship. We believe this result is consistent with Congress' directive in the TCPA that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[112]

27. We agree with Congress that consistency in the underlying regulations and administration of the national do-not-call registry is essential to avoid consumer confusion and regulatory uncertainty in the telemarketing industry. In so

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[110] *See, e.g.*, Joseph A. Durle Comments (forced to turn phone off due to constant telemarketing calls and missed call that family member had a stroke); John D. Milhous Comments; Gregory Reichenbach Comments; Christopher C. Parks Comments (receives numerous calls every day).

[111] *See* 47 U.S.C. § 227(c)(1)(A).

[112] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd at 2744.

doing, we emphasize that there will be one centralized national do-not-call database of telephone numbers. The FTC has set up and will maintain the national database, while both agencies will coordinate enforcement efforts pursuant to a forthcoming Memorandum of Understanding.[113] The states will also play an important role in the enforcement of the do-not-call rules. The FTC has received funding approval from Congress to begin implementation of the national do-not-call registry. Because the FTC lacks jurisdiction over certain entities, including common carriers, banks, insurance companies, and airlines, those entities would be allowed to continue calling individuals on the FTC's list absent FCC action exercising our broad authority given by Congress over telemarketers. In addition, the FTC's jurisdiction does not extend to intrastate activities. Action by this Commission to adopt a national do-not-call list, as permitted by the TCPA, requires all commercial telemarketers to comply with the national do-not-call requirements, thereby providing more comprehensive protections to consumers and consistent treatment of telemarketers.

I. National Do-Not-Call Registry

28. Pursuant to our authority under section 227(c), we adopt a national do-not-call registry that will provide residential consumers with a one-step option to prohibit unwanted telephone solicitations. This registry will be maintained by the FTC. Consistent with the FTC's determination, the national registry will become effective on October 1, 2003.[114] Subject to the exemptions discussed

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[113] In the *FTC Order*, the FTC outlines in detail how the national registry will be administered, including how consumers may register and how sellers may purchase the list. *See also infra*, Enforcement Priorities section, paras. 211-214.

[114] We decline to extend the effective date for the national do-not-call rules beyond October 1, 2003. *See Ex Parte Presentations* from WorldCom to FCC, filed May 23, 2003 and June 16, 2003 (advocating a

below, telemarketers will be prohibited from contacting those consumers that register their telephone numbers on the national list. In reaching this conclusion, we agree with the vast majority of consumers in this proceeding and the FTC that a national do-not-call registry is necessary to enhance the privacy interests of those consumers that do not wish to receive telephone solicitations. In response to the widespread consumer dissatisfaction with telemarketing practices, Congress has recently affirmed its support of a national do-not-call registry in approving funding for the FTC's national database.[115] In so doing, Congress has indicated that this Commission should adopt rules that "maximize consistency" with those of the FTC.[116] The record in this proceeding is replete with exam-ples of consumers that receive numerous unwanted calls on a daily basis.[117] The increase in the number of telemarketing calls over the last decade combined with the widespread use of such technologies as predictive dialers has encroached significantly on the privacy rights of consumers.[118] For example, the effectiveness of the protections

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9.5-month implementation period for the national do-not-call list requirements).

[115] *See* H.R. J. Res. 2, 108th Congress at 96 (2003) (*Consolidated Appropriations Resolution*). *See also* H.R. REP. NO. 108-8 at 3 (2003), reprinted in 2003 U.S.C.C.A.N. 688, 670 ("[i]t is the strongly held view of the Committee that a national do-not-call list is in the best interest of consumers, businesses and consumer protection authorities. This legislation is an important step toward a one-stop solution to reducing telemarketing abuses.").

[116] *See* Do-Not-Call Act, Sec. 3.

[117] *See, e.g.*, Sean Herriott Comments (receives numerous telemarketing calls each day); Lester D. McCurrie (receives between 8-12 call per day); David K. McClain Comments; Greg Rademacher Comments (receives so many calls that he now refuses to answer the phone); John Rinderle Comments; Steven D. Thorton Comments; Sandra West Comments (receives 20 calls per day).

[118] *See supra* para. 8.

afforded by the company-specific do-not-call rules have been reduced significantly by dead air and hang-up calls that result from predictive dialers. In these situations, consumers have no opportunity to invoke their do-not-call rights and the Commission cannot pursue enforcement actions. As detailed previously, such intrusions have led many consumers to disconnect their phones during portions of the day or avoid answering their telephones altogether. The adoption of a national do-call-list will be an important tool for consumers that wish to exercise control over the increasing number of unwanted telephone solicitation calls.

29. Although some industry commenters attempt to characterize unwanted solicitation calls as petty annoyances and suggest that consumers purchase certain technologies to block unwanted calls, the evidence in this record leads us to believe the cumulative effect of these disruptions in the lives of millions of Americans each day is significant. As a result, we conclude that adoption of a national do-not-call list is now warranted. We believe that consumers should, at a minimum, be given the opportunity to determine for themselves whether or not they wish to receive telephone solicitation calls in their homes. The national do-not-call list will serve as an option for those consumers who have found the company-specific list and other network technologies ineffective. The telephone network is the primary means for many consumers to remain in contact with public safety organizations and family members during times of illness or emergency. Consumer frustration with telemarketing practices has reached a point in which many consumers no longer answer their telephones while others disconnect their phones during some hours of the day to maintain their privacy. We agree with consumers that incessant telephone solicitations are especially burdensome for the elderly, disabled, and those that work non-traditional

hours.[119] Persons with disabilities are often unable to register do-not-call requests on many company-specific lists because many telemarketers lack the equipment necessary to receive that request.[120] Given the record evidence, along with Congress's recent affirmative support for a national do-not-call registry, we adopt a national do-not-call registry.[121] As discussed more fully below, however, we are mindful of the need to balance the privacy concerns of consumers with the interests of legitimate telemarketing practices. Therefore, we have provided for certain exemptions to the national do-not-call registry.

30. While we agree that concerns regarding the cost, accuracy, and privacy of a national do-not-call database remain relevant, we believe that circumstances have changed significantly since the Commission first reviewed this issue over a decade ago such that they no longer impose a substantial obstacle to the implementation of a national registry. As several commenters in this proceeding note, advances in computer technology and software now make the compilation and maintenance of a national database a more reasonable proposition.[122] In addition, considerable experience has been gained through the implementation of many state do-not-call

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[119] *See, e.g.*, Karen M. Meyer Comments (86 year-old receives as many as 10 solicitation calls per day); Vivian Sinclair Comments (85 year old with cane receives numerous telephone solicitations); Mr. and Mrs. Joseph Stephanik Comments (works at night and telemarketing calls interfere with sleep); Mavis Selway Comments (husband who works at night must answer telemarketing calls during day).

[120] *See* Telecommunications for the Deaf Comments at 2-3 (noting that telemarketers often lack TTY or telecommunications relay service).

[121] *See* H.R. REP. NO. 108-8 at 3 (2003), *reprinted in* 2003 U.S.C.C.A.N. 688, 670 ("[i]t is the strongly held view of the Committee that a national do-not-call list is in the best interest of consumers, businesses and consumer protection authorities.").

[122] *See, e.g.*, LSSi Comments at 5-6; NCS Comments at 2-4.

lists. In 1992, it was estimated by some commenters that the cost of establishing such a list in the first year could be as high as $80 million. As noted above, Congress has recently reviewed and approved the FTC's request for $18.1 million to fund the national do-not-call list.[123] We believe that the advent of more efficient technologies and the experience acquired in dealing with similar databases at the state level is responsible for this substantial reduction in cost.

Similarly, we believe that technology has become more proficient in ensuring the accuracy of a national database. The FTC indicates that to guard against the possibility of including disconnected or reassigned telephone numbers, technology will be employed on a monthly basis to check all registered telephone numbers against national databases, and remove those numbers that have been disconnected or reassigned.[124] The length of time that registrations remain valid also directly affects the accuracy of the registry as telephone numbers change hands over time. As discussed more fully below, we conclude that the retention period for both the national and company-specific do-not-call requests will be five years.[125] This is consistent with the FTC's determination and our own record that reveals that the current ten-year retention period for company-specific requests is too long given changes in telephone numbers. Consumers must also register their do-not-call requests from either the

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[123] As noted above, the FTC has awarded a contract to AT&T Government Solutions for $3.5 million to create the national registry. The Congressional Budget Office estimates that the FTC will collect and spend a total of about $73 million in fees over 2003-2008 to implement the national database. *See* H.R. REP. NO.108-8 at 6 (2003), *reprinted in* 2003 U.S.C.C.A.N. 688, 673.

[124] *FTC Order*, 68 Fed. Reg. at 4640.

[125] *See FTC Order*, 68 Fed. Reg. at 4640. Our rules previously required a company-specific do-not-call request to be honored for ten years. *See* 47 C.F.R. § 64.1200(e)(2)(vi).

telephone number of the phone that they wish to register or via the Internet. The FTC will confirm the accuracy of such registrations through the use of automatic number identification (ANI)[126] and other technologies. We believe that a five-year registration period coupled with a monthly purging of disconnected telephone numbers adequately balances the need to maintain accuracy in the national registry with any burden imposed on consumers to re-register periodically their telephone numbers.

32. We conclude that appropriate action has been taken to ensure the privacy of those registering on the national list. Specifically, the only consumer information telemarketers and sellers will receive from the national registry is the registrant's telephone number.[127] This is the minimum amount of information that can be provided to implement the national registry. We note that the majority of telephone numbers are publicly available through telephone directories. To the extent that consumers have an unlisted number, the consumer will have to make a choice as to whether they prefer to register on a national do-not-call list or maintain complete anonymity. We reiterate, however, that the only information that will be provided to the telemarketer is the telephone number of the consumer.[128] No corresponding name or address information will be provided. We believe that this approach reduces the privacy concerns of such consumers to the greatest extent possible. As an additional safeguard, we find that restrictions should be imposed on the use of the national list. Consistent

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[126] The term "ANI" refers to the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users. 47 C.F.R. § 64.1600(b).

[127] *FTC Order*, 68 Fed. Reg. at 4640.

[128] As noted above, the "seller" and "telemarketer" may be the same entity or separate entities. Each entity on whose behalf the telephone call is being made must purchase access to the do-not-call database.

with the FTC's determination and section 227(c)(3)(K), we conclude that no person or entity may sell, rent, lease, purchase, or use the national do-not-call database for any purpose except compliance with section 227 and any such state or federal law to prevent telephone solicitations to telephone numbers on such list.[129] We conclude that these safeguards adequately protect the privacy rights of those consumers who choose to register on the national do-not-call list.

33. We conclude that the national database should allow for the registration of wireless telephone numbers, and that such action will better further the objectives of the TCPA and the Do-Not-Call Act. In so doing, we agree with the FTC and several commenters that wireless subscribers should not be excluded from the protections of the TCPA, particularly the option to register on a national-do-not-call list.[130] Congress has indicated its intent to provide significant protections under the TCPA to wireless users.[131] Allowing wireless subscribers to register on a national do-not-call list furthers the objectives of the TCPA, including protection for wireless subscribers from unwanted telephone solicitations for which they are charged.

34. Nextel argues, however, that, because the "TCPA only authorizes the Commission to regulate solicitations to 'residential telephone subscribers,'" wireless subscribers may not

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[129] *See* 47 U.S.C. § 227(c)(3)(K). *See also* 16 C.F.R. § 310.4(b)(2). We also note that telemarketers will be prohibited from selling the list to others or dividing the costs of accessing the list among various client sellers. Such action would threaten the financial support for maintaining the database.

[130] *See, e.g.*, AT&T Wireless Reply Comments at 22; Charles Ferguson Comments; City of New Orleans Comments at 12; Texas Office of Public Utility Counsel Comments at 7. *See also* NAAG Comments at 35-36 contending that public safety implications may arise if wireless consumers receive unsolicited marketing calls while operating automobiles.

[131] 47 U.S.C. § 227(b)(1)(iii).

participate in the do-not-call list.[132] Nextel states we should define "residential subscribers" to mean "telephone service used primarily for communications in the subscriber's residence."[133] However, Nextel's application would result in "[a]t most, the Commission [having the] authority to regulate solicitations to wireless subscribers in those circumstances where wireless service actually has displaced a residential land line, and functions as a consumer's primary residential telephone service."[134]

35. Nextel's definition of "residential subscribers" is far too restrictive and inconsistent with the intent of section 227. Specifically, there is nothing in section 227 to suggest that only a customer's "primary residential telephone service" was all that Congress sought to protect through the TCPA. In addition, had Congress intended to exclude wireless subscribers from the benefits of the TCPA, it knew how to address wireless services or consumers explicitly. For example, in section 227(b)(1), Congress specifically prohibited calls using automatic telephone dialing systems or artificial or prerecorded voice to telephone numbers assigned to "paging service [or] cellular telephone service . . . ." Moreover, under Nextel's definition, even consumers who use their wireless telephone service in their homes to supplement their residential wireline service, such as by using their wireless

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[132] Nextel Comments at 19. We note that section 227(c)(1) uses the phrase "residential telephone subscribers" and that section 227(c)(3), which more specifically discusses the do-not-call database, uses the phrase "residential subscribers." Neither of these terms is defined in the TCPA. Thus, we see no basis in the legislative language or history for considering them to be materially different. Nor do we see a basis for distinction in common usage. Therefore, we will interpret them to be synonymous and will refer to both by using the term "residential subscribers."

[133] Nextel Comments at 19.

[134] Nextel Comments at 21.

telephone service to make long distance phone calls to avoid wireline toll charges, would be excluded from the protections of the TCPA. Such an interpretation is at odds even with Nextel's own reasoning for its definition–that the TCPA's goal is "to curb the 'pervasive' use of telemarketing 'to market goods and services to the home'."[135] As described, it is well-established that wireless subscribers often use their wireless phones in the same manner in which they use their residential wireline phones.[136] Indeed, as even Nextel recognizes, there is a growing number of consumers who no longer maintain wireline phone service, and rely only on their wireless telephone service. Thus, we are not persuaded by Nextel's arguments.

36. Moreover, we believe it is more consistent with the overall intent of the TCPA to allow wireless subscribers to benefit from the full range of TCPA protections. As indicated above, Congress afforded wireless subscribers particular protections in the context of autodialers and prerecorded calls.[137] In addition, although Congress expressed concern with residential privacy, it also was concerned with the nuisance, expense and burden that telephone solicitations

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[135] Nextel Comments at 20.

[136] For example, the Commission recently relied on wireless broadband PCS substitution to support "Track A" findings in two section 271 proceedings where residential customers in New Mexico and Nevada had replaced their landline service with wireless service. *See Application by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Nevada*, WC Docket No. 03-10, Memorandum Opinion and Order, FCC 03-80 at paras. 16 - 26 (rel. April 14, 2003); *see also* Federal Communications Commission, Seventh Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services at 32-36 (*Seventh Annual CMRS Competition Report*).

[137] 47 U.S.C. § 227(b)(1)(A)(iii).

place on consumers.[138] Therefore, we conclude that wireless subscribers may participate in the national do-not-call list. As a practical matter, since determining whether any particular wireless subscriber is a "residential subscriber" may be more fact-intensive than making the same determination for a wireline subscriber, we will presume wireless subscribers who ask to be put on the national do-not-call list to be "residential subscribers."[139] Such a presumption, however, may require a complaining wireless subscriber to provide further proof of the validity of that presumption should we need to take enforcement action.

37. We emphasize that it is not our intent in adopting a national do-not-call list to prohibit legitimate telemarketing practices. We believe that industry commenters present a false choice between the continued viability of the telemarketing industry and the adoption of a national do-not-call list. We are not persuaded that the adoption of a national do-not-call list will unduly interfere with the ability of telemarketers to contact consumers. Many consumers will undoubtedly take advantage of the opportunity to register on the national list. Several industry commenters suggest, however, that consumers derive substantial benefits from telephone solicitations. If so, many such consumers will choose not to register on the national do-not-call list and will opt instead to make do-not-call requests on a case-by-case basis or give express permission to be contacted by specific companies.[140] In addition, as discussed further below, we have provided for certain exemptions to the do-not-call registry in

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[138] S. REP. NO. 102-178 at 1 (noting that telephone solicitations are both a nuisance and an invasion of privacy).

[139] This presumption is only for the purposes of section 227 and is not in any way indicative of any attempt to classify or regulate wireless carriers for purposes of other parts of Title II.

[140] We also note that numerous alternative marketing outlets remain available to sellers, such as newspapers, television, radio, and direct mail.

recognition of legitimate telemarketing business practices. For example, sellers of goods or services via telemarketing may continue to contact consumers on the national list with whom they have an established business relationship. We also note that calls that do not fall within the definition of "telephone solicitation" as defined in section 227(a)(3) will not be precluded by the national do-not-call list. These may include surveys, market research, political or religious speech calls.[141] The national do-not-call rules will also not prohibit calls to businesses and persons with whom the marketer has a personal relationship. Telemarketers may continue to contact all of these consumers despite the adoption of a national do-not-call list. Furthermore, we decline to adopt more restrictive do-not-call requirements on telemarketers as suggested by several commenters. For example, we decline to adopt an "opt-in" approach that would ban telemarketing to any consumer who has not expressly agreed to receive telephone solicitations. We believe that establishing such an approach would be overly restrictive on the telemarketing industry. As discussed more fully below, we also decline to extend the national do-not-call requirements to tax-exempt nonprofit organizations or entities that telemarket on behalf of nonprofit organizations.

38. We agree with the FTC that a safe harbor should be established for telemarketers that have made a good faith

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[141] Such calls may be prohibited if they serve as a pretext to an otherwise prohibited advertisement or a means of establishing a business relationship. Moreover, responding to such a "survey" does not constitute express permission or establish a business relationship exemption for purposes of a subsequent telephone solicitation. *See* H.R. REP. NO. 102-317 at 13 ("[T]he Committee does not intend the term 'telephone solicitation' to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone. A call encouraging a purchase, rental, or investment would fall within the definition, however, even though the caller purports to be taking a poll or conducting a survey.").

effort to comply with the national do-not call rules.[142] A seller or telemarketer acting on behalf of the seller that has made a good faith effort to provide consumers with an opportunity to exercise their do-not-call rights should not be liable for violations that result from an error. Consistent with the FTC, we conclude that a seller or the entity telemarketing on behalf of the seller will not be liable for violating the national do-not-call rules if it can demonstrate that, as part of the seller's or telemarketer's routine business practice: (i) it has established and implemented written procedures to comply with the do-not-call rules; (ii) it has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the do-not-call rules; (iii) the seller, or telemarketer acting on behalf of the seller, has maintained and recorded a list of telephone numbers the seller may not contact; (iv) the seller or telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to the do-not-call rules employing a version of the do-not-call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process; and (v) any subsequent call otherwise violating the do-not-call rules is the result of error.[143] We acknowledge that the three-month safe harbor period for telemarketers may prove to be too long to benefit some consumers. The national do-not-call list has the capability to process new registrants virtually instantaneously and telemarketers will have the capability to download the list at any time at no extra cost. The Commission intends to carefully monitor the impact of this requirement pursuant to its annual report to Congress and may consider a shorter time frame in the future.

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[142] *See FTC Order,* 68 Fed. Reg. at 4645-46.

[143] *See* 16 C.F.R. § 310.4(b)(3).

39. As required by section 227(c)(1)(A), we have compared and evaluated the advantages and disadvantages of certain alternative methods to protect consumer privacy including the use of network technologies, special directory markings, and company-specific lists in adopting a national do-not-call database.[144] As noted below, the effectiveness of the company-specific approach has significantly eroded as a result of hang-up and "dead air" calls from predictive dialers. Consumers in these circumstances have no opportunity to assert their do-not-call rights. As discussed more fully below, we believe that, as a stand-alone option, the company-specific approach no longer provides consumers with sufficient privacy protections. We also conclude that the availability of certain network technologies to reduce telephone solicitations is often ineffective and costly for consumers. Although technology has improved to assist consumers in blocking unwanted calls, it has also evolved in such a way as to assist telemarketers in making greater numbers of calls and even circumventing such blocking technologies.[145] Millions of consumers continue to register on state do-not-call lists despite the availability of such technologies. Several commenters note that they continue to receive unwanted calls despite paying for technologies to reduce telephone solicitations.[146] Several commenters also note that telemarketers routinely block transmission of caller ID. In particular, we are concerned that the cost of technologies such as caller ID, call blocking, and other such tools in an effort to reduce telemarketing calls fall entirely on the consumer. We believe

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[144] *See* 47 U.S.C. § 227(c)(1)(A).

[145] *See* "New telemarketer tool trumps TeleZapper," CNN.com (February 26, 2003) <http://edition.cnn.com/2003/TECH/ptech/02/26/telemarket.tool.ap/> (noting development of software that allows telemarketers to circumvent the telezapper and other blocking devices).

[146] *See, e.g.*, Leslie Price Comments (telezapper ineffective); Josephine Presley Comments (call blocking ineffective).

that reliance on a solution that places the cost of reducing the number of unwanted solicitation calls entirely on the consumer is inconsistent with Congress' intent in the TCPA.[147] For the reasons outlined in the *1992 TCPA Order*, we also decline to adopt special area codes or prefixes for telemarketers.[148] We believe this option is costly for telemarketers that would be required to change their telephone numbers and administratively burdensome to implement. We also decline to adopt special directory markings of area white page directories because it would require telemarketers to purchase and review thousands of local telephone directories, at great cost to the telemarketers.[149] We also note that telemarketers often compile solicitation lists from many sources other than local telephone directories. In addition, such directories do not include unlisted or unregistered telephone numbers and are often updated infrequently. We also note that the record in this proceeding provides little support for this option.

40. We now review the other requirements of section 227(c)(1). As required by section 227(c)(1)(B), we have evaluated AT&T Government Solutions, the entity selected by the FTC to administer the national database, and conclude that it has the capacity to establish and administer the national database.[150] Congress has reviewed and approved funding for the implementation of that database. We believe that it is

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[147] For example, section 227(c) prohibits consumers from being charged to place their number on a national do-not-call list. *See* 47 U.S.C. § 227(c)(3)(E).

[148] *See 1992 TCPA Order*, 7 FCC Rcd at 8761-62, paras. 16-17.

[149] *See* 47 U.S.C. § 227(c)(4)(C) (requiring the Commission to consider "whether the needs of telemarketers operating on a local basis could be met through special markings of area white page directories"). This conclusion is consistent with the Commission's conclusion in 1992.

[150] *See* Letter from Michael Del Casino, AT&T, to Marlene Dortch, FCC, dated March 18, 2003.

unnecessary to evaluate any other such entities at this time. As discussed in greater detail below, we have considered whether different methods and procedures should apply for local telephone solicitations and small businesses as required by section 227(c)(1)(C).[151] For the reasons outlined below, we conclude that the national do-not-call database takes into consideration the costs of those conducting telemarketing on a local or regional basis, including many small businesses. In particular, we note that the national do-not-call database will permit access to five or fewer area codes at no cost to the seller. Pursuant to section 227(c)(1)(D), we have considered whether there is a need for additional authority to further restrict telephone solicitations. We conclude that no such authority is required at this time.[152] Pursuant to the Do-Not-Call Act, the Commission must report to Congress on an annual basis the effectiveness of the do-not-call registry. Should the Commission determine that additional authority is required over telephone solicitations as part of that analysis; the Commission will propose specific restrictions pursuant to that report. As required by section 227(c)(1)(E), we have developed regulations to implement the national do-not-call database in the most effective and efficient manner to protect consumer privacy needs while balancing legitimate telemarketing interests.

41. As noted above, the FTC's decision to adopt a national do-not-call list is currently under review in federal district

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[151] *See infra* para. 54.

[152] This finding is dependent, in large part, on conclusions that we have reached elsewhere in this order. For example, our conclusion that the McCarran-Ferguson Act does not necessarily prohibit the application of the national registry to insurance companies; rather, the implications of the McCarran-Ferguson Act will need to be evaluated on a case-by-case basis. The Commission may seek further clarification or authority from Congress as necessary to support these conclusions.

court.[153] Because Congress has approved funding for the administration of the national list only for the FTC, this Commission would be forced to stay implementation of any national list should the plaintiffs prevail in one of those proceedings.

2. Exemptions

42. *Established Business Relationship.* We agree with the majority of industry commenters that an exemption to the national do-not-call list should be created for calls to consumers with whom the seller has an established business relationship.[154] We note that section 227(a)(3) excludes from the definition of telephone solicitation calls made to any person with whom the caller has an established business relationship.[155] We believe the ability of sellers to contact existing customers is an important aspect of their business plan and often provides consumers with valuable information regarding products or services that they may have purchased from the company. For example, magazines and newspapers may want to contact customers whose subscriptions have or soon will expire and offer new subscriptions. This conclusion is consistent with that of the FTC and the majority of states that have adopted do-not-call requirements and considered this issue. As discussed in further detail below, we revise the definition of an established business relationship so that it is limited in duration to eighteen (18) months from any purchase or transaction and 3 months from any inquiry or application.[156]

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[153] *See supra* note 39.

[154] *See, e.g.*, NCTA Comments at 6; NAA Comments at 14; MBA Further Comments at 4.

[155] 47 U.S.C. § 227(a)(3).

[156] *See* amended 47 C.F.R. § 64.1200(f)(3).

43. To the extent that some consumers oppose this exemption, we find that once a consumer has asked to be placed on the seller's company-specific do-not-call list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. We believe this determination constitutes a reasonable balance between the interests of consumers that may object to such calls with the interests of sellers in contacting their customers. This conclusion is also consistent with that of the FTC.

44. *Prior Express Permission.* In addition to the established business relationship exemption, we conclude that sellers may contact consumers registered on a national do-not-call list if they have obtained the prior express permission of those consumers. We note that section 227(a)(3) excludes from the definition of telephone solicitation calls to any person with "that person's prior express invitation or permission."[157] Consistent with the FTC's determination, we conclude that for purposes of the national do-not-call list such express permission must be evidenced only by a signed, written agreement between the consumer and the seller which states that the consumer agrees to be contacted by this seller, including the telephone number to which the calls may be placed.[158] Consumers registered on the national list may wish to have the option to be contacted by particular entities.

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[157] 47 U.S.C. § 227(a)(3). *See also* H.R. REP. NO. 102-317 at 13 (1991) (suggesting that Congress did not believe such prior express permission need be in writing) We believe that in discussing the form in which *prior express permission* must be given, Congress was addressing an exemption to the definition of telephone solicitation. Here, we are addressing the type of prior express permission that would allow calls to consumers who already have indicated that they do not wish to receive telemarketing calls (by registering on the do-not-call list).

[158] For purposes of this exemption, the term "signed" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal or state contract law.

Therefore, we conclude that sellers may obtain the express written agreement to call such consumers. The express agreement between the parties shall remain in effect as long as the consumer has not asked to be placed on the seller's company-specific do-not-call list. If the consumer subsequently requests not to be called, the seller must cease calling the consumer regardless of whether the consumer continues to do business with the seller. We also note that telemarketers may not call consumers on the national do-not-call list to request their written permission to be called unless they fall within some other exemption. We believe that to allow such calls would circumvent the purpose of this exemption. Prior express permission must be obtained by some other means such as direct mailing.

45. *Tax-Exempt Nonprofit Organizations.* We agree with those commenters that contend that the national do-not-call requirements should not be extended to tax-exempt nonprofit organizations or calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations.[159] We note that section 227(a)(3) specifically excludes calls made by tax-exempt nonprofit organizations from the definition of telephone solicitation.[160] In so doing, we believe Congress clearly intended to exclude tax-exempt nonprofit organizations from prohibitions on telephone solicitations under the TCPA. The legislative history indicates that commercial calls constitute the bulk of all telemarketing calls.[161] A number of commenters and the FTC agree with Congress' conclusion as it relates to a national do-not-call list.[162] For this reason, we

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[159] *See, e.g.*, Association of Fundraising Professionals Comments at 3-4; Fund for Public Interest Comments at 2; March of Dimes Comments at 2; Special Olympics of Hawaii Comments.

[160] 47 U.S.C. § 227(a)(3).

[161] *See* H.R. REP. NO. 102-317 at 16 (1991).

[162] *See, e.g.*, Fund for Public Interest Comments at 2; March of Dimes Comments at 2; Non-for-Profit Coalition Comments at 11-13; Special

decline to extend the national do-not-call requirements to tax-exempt nonprofit organizations. A few commenters seek clarification that requests for blood donations will be exempt from the national do-not-call list.[163] When such requests are made by tax-exempt nonprofit organizations, they will fall within the exemption for tax-exempt nonprofit organizations.

46. *Others*. We decline to create specific exemptions to the national do-not-call requirements for entities such as newspapers, magazines, regional telemarketers, or small businesses.[164] For the reasons discussed above, we find unpersuasive arguments that application of the national do-not-call database adopted herein will result in severe economic consequences for these entities. In particular, we note the exemptions adopted for calls made to consumers with whom the seller has an established business relationship and those that have provided express agreement to be called. As noted, many consumers may also determine not to register on the national database. Telemarketers may continue to contact all of these consumers. We believe these exemptions provide telemarketers with a reasonable opportunity to conduct their business while balancing consumer privacy interests.

Olympics Hawaii Comments. *But see* Wayne G. Strang Comments at 7-8; Michael C. Worsham Comments at 10. Commenters also argue that restrictions imposed on tax-exempt nonprofit organizations or organizations acting on their behalf are subject to more stringent scrutiny under the First Amendment as noncommercial speech. *See* NPCC Comments at 15-18.

[163] *See, e.g.*, American Red Cross Comments at 2; America's Blood Centers Comments at 1.

[164] *See, e.g.*, Newspaper Association of America Comments at 12-14 (noting that newspapers are holders of second-class mail permits); Personal Legal Plans Comments at 5 (contending that small businesses should be exempt); Seattle Times Comments at 2 (proposing exemption for newspapers); Vector Comments at 7 (proposing exemption for entities that make a *de minimis* number of calls); Ameriquest Further Comments at 2 ("face-to-face" exemption).

Although we agree that newspapers and other entities may often provide useful information and services to the public, given our conclusion that adoption of the national do-not-call list will not unduly interfere with the ability of telemarketers to reach consumers, we do not find this to be a compelling basis to exempt these entities.

47. We find that the national do-not-call rules adopted today do not apply to calls made to persons with whom the marketer has a personal relationship. As discussed herein, a "personal relationship" refers to an individual personally known to the telemarketer making the call. In such cases, we believe that calls to family members, friends and acquaintances of the caller will be both expected by the recipient and limited in number.[165] Therefore, the two most common sources of consumer frustration associated with telephone solicitations–high volume and unexpected solicitations–are not likely present when such calls are limited to persons with whom the marketer has a personal relationship.[166] Accordingly, we find that these calls do not represent the type of "telephone solicitations to which [telephone subscribers] object" discussed in section 227(c)(1). Moreover, we con-

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[165] In determining whether a telemarketer is considered a 'friend' or 'acquaintance' of a consumer, we will look at, among other things, whether a reasonable consumer would expect calls from such a person because they have a close or, at least, firsthand relationship. If a complaining consumer were to indicate that a relationship is not sufficiently personal for the consumer to have expected a call from the marketer, we would be much less likely to find that the personal relationship exemption is applicable. While we do not adopt a specific cap on the number of calls that a marketer may make under this exemption, we underscore that the limited nature of the exemption creates a strong presumption against those marketers who make more than a limited number of calls per day.

[166] We note that this conclusion is consistent with Congress' rationale in exempting tax-exempt nonprofit organizations and established business relationships from the definition of telephone solicitation. *See* H.R. Rep. No. 102-317 at 14 and 16 (1991).

clude that the Commission also has authority to recognize this limited carve-out pursuant to section 227(c)(1)(E). This subsection provides the Commission with discretion in implementing rules to protect consumer privacy to "develop proposed regulations to implement the methods and procedures that the Commission determines are the most effective and efficient to accomplish the purpose of this section."[167] To the extent that any consumer objects to such calls, the consumer may request to be placed on the telemarketer's company's company-specific do-not-call list. We intend to monitor the rules we adopt today and caution that any individual or entity relying on personal relationships abusing this exemption may be subject to enforcement action.

48. In addition, we decline to extend this approach beyond persons that have a personal relationship with the marketer. For example, Vector urges the Commission to adopt an exemption that covers "face-to-face" appointment calls to anyone known personally to the "referring source."[168] We note that such relationships become increasingly tenuous as they extend to individuals not personally known to the marketer and thus such calls are more likely to be unexpected to the recipient and more voluminous. Accordingly, referrals to persons that do not have a personal relationship with the marketer will not fall within the category of calls discussed above.

49. We also decline to establish an exemption for calls made to set "face-to-face" appointments per se.[169] We

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[167] 47 U.S.C § 227(c)(1)(E).

[168] *See* Vector Further Comments at Att. 2. Vector makes approximately 4 million calls per year. Vector Comments at 6.

[169] *See, e.g.*, Ameriquest Comments at 14; Vector Comments at 6-7. Such calls may, however, be permissible when they fall within exemptions for personal or established business relationships as discussed herein.

conclude that such calls are made for the purpose of encouraging the purchase of goods and services and therefore fall within the statutory definition of telephone solicitation. We find no reason to conclude that such calls are somehow less intrusive to consumers than other commercial telephone solicitations. The FTC has reviewed this issue and reached the same conclusion.[170] In addition, we decline to exempt entities that make a "*de minimis*" number of commercial telemarketing calls.[171] In contrast to Congress' rationale for exempting nonprofit organizations, we believe that such commercial calls continue to be unexpected to consumers even if made in low numbers. As defined by one commenter, a *de minimis* number of calls would not be based on the total number of calls originating from one organization, but would be based on the number of calls placed by individual employees of the company.[172] Thus, the telemarketing entity could circumvent the do-not-call regulations by hiring any number of individual marketers, so long as they each did not make more than 20 calls per day. We believe that such an exemption, extrapolated to the entire direct marketing industry, would result in a significant number of unwanted telephone solicitations. This would undoubtedly result in consumer confusion and frustration regarding the application of the national do-not-call rules. In addition, we believe that it would be difficult, if not impossible, to monitor and enforce such a requirement. For the reasons discussed below, we do not believe the costs to access the national database is unreasonable for any small business or entity making a "*de minimis*" number of calls.

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[170] *FTC Order*, 68 Fed. Reg. 4655-56.

[171] For example, Vector suggests that the Commission exempt individual direct sellers who make no more than 20 calls per day. Vector Comments at 8-10.

[172] Vector Further Comments at 4. Vector makes approximately 4 million calls per year. Vector Comments at 6.

50. In response to the *Further Notice*, a few commenters contend that any new rules the Commission adopts would not apply to entities engaged in the business of insurance, because such rules would conflict with the McCarran-Ferguson Act.[173] The McCarran-Ferguson Act provides that "[t]he business of insurance . . . shall be subject to the laws of the . . . States which relate to the regulation . . . of such business."[174] The McCarran-Ferguson Act further provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[175] American Council of Life Insurers (ACLI) explains that insurers' marketing activities are extensively regulated at the state–level. The Commission's proposal, ACLI argues, "intrudes upon the insurance regulatory framework established by the states" and, therefore, should not be applicable to insurers under McCarran-Ferguson.[176]

51. The McCarran-Ferguson Act does not operate to exempt insurance companies wholesale from liability under the TCPA. It applies only when their activities constitute the "business of insurance," the state has enacted laws "for the purpose of regulating" the business of insurance, and the TCPA would "impair, invalidate, or supersede" such state

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[173] *See* ACLI Further Comments at 1-3; Stonebridge Further Comments at 5-7; Cendant Further Comments at 3-4; NAII Further Comments at 3. We note that many other commenters representing insurance interests did not raise this issue before or during the Further Notice comment period.

[174] 15 U.S.C. § 1012(a).

[175] 15 U.S.C. § 1012(b).

[176] *See* ACLI Further Comments at 1-2.

laws.[177] In the one case cited by commenters as addressing the interplay between McCarran-Ferguson and the TCPA, a federal district court dismissed a claim brought against two insurance companies under the TCPA for sending unsolicited facsimile advertisements.[178] The *Chair King* court found that the TCPA conflicted with a Texas law that prohibited untrue, deceptive, or misleading advertising by insurers and their agents. In its analysis, the court determined that insurance advertising was part of the "business of insurance,"[179] and that the Texas law in question was enacted for the purpose of regulating the business of insurance.[180] The court then concluded that because the TCPA "prohibits unsolicited insurance advertising by facsimile while the Texas [laws] permit [such] advertising . . . so long as the advertisements are truthful and not misleading," the TCPA conflicts with the Texas law and is preempted under McCarran-Ferguson.[181]

52. To the extent that any state law regulates the "business of insurance"[182] and the TCPA is found to "invalidate, impair,

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[177] *See* 15 U.S.C. § 1012(b); *see also The Chair King, Inc. v. Houston Cellular Corp.*, 1995 WL 1760037 (S.D. Tex. 1995), *vacated for lack of subject matter jurisdiction* 131 F.3d 507 (5th Cir. 1997).

[178] *The Chair King, Inc. v. Houston Cellular Corp.*, 1995 WL 1760037 (S.D. Tex. 1995).

[179] *See Chair King*, 1995 WL 1760037 at 3 (*citing SEC v. National Securities Inc.*, 393 U.S. 453, 460 (1960) and *FTC v. National Casualty Co.*, 357 U.S. 560 (1958)).

[180] *See Chair King*, 1995 WL 1760037 at 4.

[181] We note that the TCPA's prohibition does not specifically reference insurance advertising. The TCPA also permits facsimile advertising to persons who have given their prior express invitation or permission. See 47 U.S.C. §§ 227(b)(1)(C) and (a)(4).

[182] NAII explains that "[s]tate insurance codes prohibit a variety of unfair trade practices, such as rebating, deceptive advertising, inequitable claim settlement and unfair discrimination." *See* NAII Further Comments at 2.

or supersede" such state law, it is possible that a particular activity involving the business of insurance would not fall within the reach of the TCPA. Any determination about the applicability of McCarran-Ferguson, however, requires an analysis of the particular activity and State law regulating it. In addition, McCarran-Ferguson applies only to federal statutes that "invalidate, impair, or supersede" state insurance regulation. Courts have held that duplication of state law prohibitions by a federal statute do not "invalidate, impair, or supersede" state laws regulating the business of insurance.[183] Nor is the mere presence of a regulatory scheme enough to show that a state statute is "invalidated, impaired or superseded."[184]

53. We believe that the TCPA, which was enacted to protect consumer privacy interests, is compatible with states' regulatory interests.[185] In fact, the TCPA permits States to enforce the provisions of the TCPA on behalf of residents of their State.[186] In addition, we believe that uniform application of the national do-not-call registry to all entities that use the telephone to advertise best serves the goals of the TCPA. To exempt the insurance industry from liability under the TCPA

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[183] *See, e.g., Merchant Home Delivery Serv. Inc. v. Frank B. Hall & Co. Inc.*, 50 F.3d 1486, 1492 (9th Cir. 1995) (holding federal statute prohibiting acts also prohibited under state law not to "invalidate, impair, or supersede" state law under McCarran-Ferguson); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994) (holding duplicate prohibition of redlining under Indiana law not to preempt Fair Housing Act under McCarran-Ferguson Act).

[184] *See, e.g., Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 421 (4th Cir. 1984).

[185] *See U.S. v. Calvin*, 39 F.3d 1299, 1305 (5th Cir. 1994) (noting that government charges of fraud not barred by McCarran-Ferguson Act where interest in fraud protection is completely compatible with state's regulatory interests).

[186] *See* 47 U.S.C. § 227(f)(1).

would likely confuse consumers and interfere with the protections provided by Congress through the TCPA. Therefore, to the extent that the operation of McCarran-Ferguson on the TCPA is unclear, we will raise this issue in our Report to Congress as required by the Do-Not-Call Act.

54. We conclude that the national do-not-call mechanism established by the FTC and this Commission adequately takes into consideration the needs of small businesses and entities that telemarket on a local or regional basis in gaining access to the national database. As required by section 227(c)(1)(C), we have considered whether different procedures should apply for local solicitations and small businesses. We decline, however, to exempt such entities from the national do-not-call requirements. Given the large number of entities that solicit by telephone, and the technological tools that allow even small entities to make a significant number of solicitation calls, we believe that to do so would undermine the effectiveness of the national do-not-rules in protecting consumer privacy and create consumer confusion and frustration. In so doing, we conclude that the approach adopted herein satisfies section 227(c)(4)'s requirement that the Commission, in developing procedures for gaining *access* to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level and develop a fee schedule for recouping the cost of such database that recognizes such differences.[187] The national database will be available for purchase by sellers on an area-code-by-area-code basis. The cost to access the database will vary depending on the number of area codes requested. Sellers need only purchase those area codes in which the seller intends to telemarket. In fact, sellers that request access to five or fewer area codes will be granted access to those area codes at no cost. We note that thirty-three

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[187] 47 U.S.C. § 227(c)(4)(A)-(B) (emphasis added).

states currently have five or fewer area codes. Thus, telemarketers or sellers operating on a "local" or "regional" basis within one of these thirty-three states will have access to all of that states' national do-not-call registrants at no cost. In addition, the national database will provide a single number lookup feature whereby a small number of telephone numbers can be entered on a web page to determine whether any of those numbers are included on the national registry. We believe this fee structure adequately reflects the needs of regional telemarketers, small business and those marketing on a *de minimis* level. For these reasons, we conclude that this approach will not place any unreasonable costs on small businesses.[188]

3. Section 227(c)(3) Requirements

55. We conclude that the national do-not-call database adopted jointly by this Commission and the FTC satisfies each of the statutory requirements outlined in section 227(c)(3)(A)-(L). We now discuss each such requirement. Section 227(c)(3)(A) requires the Commission to specify the method by which an entity to administer the national database will be selected. On August 2, 2002, the FTC issued a Request for Quotes (RFQ) to selected vendors on GSA schedules seeking proposals to develop, implement, and operate the national registry. After evaluating those proposals, the FTC selected a competitive range of vendors and issued an amended RFQ to those vendors on November 25, 2002. After further evaluation, the FTC selected AT&T Government Solutions as the successful vendor for the national do-not-call database on March 1, 2003.[189] As noted above, Congress has approved the necessary funding for implementation of the national database.

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[188] *See* 47 U.S.C. § 227(c)(4)(B)(iii).

[189] *See also* Letter from Michael Del Casino, AT&T, to Marlene Dortch, FCC, dated March 18, 2003.

56. Pursuant to sections 227(c)(3)(B)-(C), we require each common carrier providing telephone exchange service to inform subscribers for telephone exchange service of the opportunity to provide notification that such subscriber objects to receiving telephone solicitations. Each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national database and (ii) the methods by which such rights may be exercised by the subscriber. Pursuant to section 227(c)(3)(C), we conclude that, beginning on January 1, 2004, such common carriers shall provide an annual notice, via an insert in the customer's bill, to inform their subscribers of the opportunity to register or revoke registrations on the national do-not-call database. Although we do not specify the exact description or form that such notification should take, such notification must be clear and conspicuous. At a minimum, it must include the toll-free telephone number and internet address established by the FTC to register or revoke registrations on the national do-not-call database.

57. Section 227(c)(3)(D) requires the Commission to specify the methods by which registrations shall be collected and added to the database. As discussed above, consumers will be able to add their telephone numbers to the national do-not-call registry either through a toll-free telephone call or over the Internet.[190] Consumers who choose to register by phone will have to call the registration number from the telephone line that they wish to register. Their calls will be answered by an Interactive Voice Response (IVR) system. The consumers will be asked to enter on their telephone keypad the telephone number from which the consumer is calling. This number will be checked against the ANI that is

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[190] *FTC Order*, 68 Fed. Reg. at 4638-39.

transmitted with the call. If the number entered matches the ANI, then the consumer will be informed that the number has been registered. Consumers who choose to register over the Internet will go to a website dedicated to the registration process where they will be asked to enter the telephone number they wish to register.[191] We encourage the FTC to notify consumers in the IVR message that the national registry will prevent most, but not all, telemarketing calls. Specifically, we believe consumers should be informed that the do-not-call registry does not apply to tax-exempt nonprofit organizations and companies with whom consumers have an established business relationship. The effectiveness and value of the national registry depends largely on an informed public. Therefore, we also intend to emphasize in our educational materials and on our website the purpose and scope of the new rules.

58. Section 227(c)(3)(E) prohibits any residential subscriber from being charged for giving or revoking notification to be included on the national do-not-call database. As discussed above, consumers may register or revoke do-not-call requests either by a toll-free telephone call or over the Internet. No charge will be imposed on the consumer. Section 227(c)(3)(F) prohibits any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included on the national database. Subject to the exemptions discussed above, we adopt rules herein that will prohibit telephone solicitations to those consumers that have registered on the national database.[192]

59. Section 227(c)(3)(G) requires the Commission to specify (i) the methods by which any person deciding to make telephone solicitations will obtain access to the database, by area code or local exchange prefix, and (ii) the costs to be

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[191] *FTC Order*, 68 Fed. Reg. at 4639.

[192] *See also* 16 C.F.R. § 310.4(b)(1)(iii)(B).

recovered from such persons. Section 227(c)(3)(H) requires the Commission to specify the methods for recovering, from the persons accessing the database, the costs involved in the operations of the database. To comply with the national do-not-call rules, telemarketers must gain access to the telephone numbers in the national database. Telemarketers will have access to the national database by means of a fully-automated, secure website dedicated to providing information to these entities.[193] The first time a telemarketer accesses the system, the company will be asked to provide certain limited identifying information, such as name and address, contact person, and contact person's telephone number and address. If a telemarketer is accessing the registry on behalf of a client seller, the telemarketer will also need to identify that client.[194] When a telemarketer first submits an application to access registry information, the company will be asked to specify the area codes they want to access. An annual fee will be assessed based upon the number of area codes requested.[195] Each entity on whose behalf the telephone solicitation is being made must pay this fee via credit card or electronic funds transfer. After payment is processed, the telemarketer will be given an account number and permitted to access the appropriate portions of the registry.[196] Telemarketers will be permitted to access the registry as often as they wish for no additional cost, once the annual fee is paid.

60. Section 227(c)(3)(I) requires the Commission to specify the frequency with which the national database will

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[193] *FTC Order*, 68 Fed. Reg. at 4640.

[194] *FTC Order*, 68 Fed. Reg. at 4640.

[195] *Telemarketing Sales Rule Fees*, 68 Fed. Reg. 16238 (April 3, 2003) (*FTC Fees Notice*). The FTC has proposed that sellers be charged $29 per area code with a maximum annual fee of $7,250 for access to the entire national database. Sellers may request access to five or less areas codes for free.

[196] *FTC Order*, 68 Fed. Reg. at 4640.

be updated and specify the method by which such updates will take effect for purposes of compliance with the do-not-call regulations. Because the registration process will be completely automated, updates will occur continuously. Consumer registrations will be added to the registry at the same time they register-or at least within a few hours after they register. As discussed above, the safe harbor provision requires telemarketers to employ a version of the registry obtained not more than three months before any call is made. Thus, telemarketers will be required to update their lists at least quarterly. Instead of making the list available on specific dates, the registry will be available for downloading on a constant basis so that telemarketers can access the registry at any time.[197] As a result, each telemarketer's three-month period may begin on different dates.[198] In addition, the administrator will check all telephone numbers in the do-not-call registry each month against national databases, and those numbers that have been disconnected or reassigned will be removed from the registry.[199] We encourage parties that may have specific recommendations on ways to improve the overall accuracy of the database in removing disconnected and reassigned telephone numbers to submit such proposals to our attention and to the FTC directly.

61. Section 227(c)(3)(J) requires that the Commission's regulations be designed to enable states to use the database for purposes of administering or enforcing state law.[200] Section 227(c)(3)(K) prohibits the use of the database for any

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[197] *FTC Order*, 68 Fed. Reg. at 4647.

[198] Appropriate state and federal regulators will be capable of verifying when the telemarketer last accessed the list. *FTC Order*, 68 Fed. Reg. at 4641.

[199] *FTC Order*, 68 Fed. Reg. at 4640.

[200] In fact, section 227(e)(2) prohibits states from using any database that does not include the part of the national database that relates to such state. *See* 47 U.S.C. § 227(e)(2).

purpose other than compliance with the do-not-call rules and any such state law and requires the Commission to specify methods for protection of the privacy rights of persons whose numbers are included in such database. Consistent with the determination of the FTC, we conclude that any law enforcement agency that has responsibility to enforce federal or state do-not-call rules or regulations will be permitted to access the appropriate information in the national registry.[201] This information will be obtained through a secure Internet website. Such law enforcement access to data in the national registry is critical to enable state Attorneys General, public utility commissions or an official or agency designated by a state, and other appropriate law enforcement officials to gather evidence to support enforcement of the do-not-call rules under the state and federal law. In addition, as discussed above, we have imposed restrictions on the use of the national list.[202] Consistent with the FTC's determination, we have concluded that no person or entity may sell, rent, lease, purchase, or use the national do-not-call database for any purpose except compliance with section 227 and any such state or federal law to prevent telephone solicitations to telephone numbers on such list. We specifically prohibit any entity from purchasing this list from any entity other than the national do-not-call administrator or dispensing the list to any entity that has not paid the required fee to the administrator. The only information that will be made available to telemarketers is the telephone number of consumers registered on the list. Given the restrictions imposed on the use of the national database and the limited amount of information provided, we believe that adequate privacy protections have been established for consumers.

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[201] *See FTC Order*, 68 Fed. Reg. at 4641.

[202] *See supra* para. 32.

62. Section 227(c)(3)(L) requires each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of the national do-not-call rules and the regulations thereunder. We therefore require common carriers, beginning January 1, 2004, to make a one-time notification to any person or entity making telephone solicitations that is served by that carrier of the national do-not-call requirements. We do not specify the exact description or form that such notification should take. At a minimum, it must include a citation to the relevant federal do-not-call rules as set forth in 47 C.F.R. § 64.1200 and 16 C.F.R. Part 310, respectively. Although we recognize that carriers may not be capable of identifying every person or entity engaged in telephone solicitations served by that carrier, we require carriers to make reasonable efforts to comply with this requirement. We note that failure to give such notice by the common carrier to a telemarketer served by that carrier will not excuse the telemarketer from violations of the Commission's rules.

4. Constitutionality

63. We conclude that a national do-not-call registry is consistent with the First Amendment. As discussed in more detail below, we believe, like the FTC, that our regulations satisfy the criteria set forth in *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, in which the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech.[203] Our conclusion is also consistent with every Court

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[203] *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557 (1980). NAAG argues that *Central Hudson* may not even be the appropriate analytical framework to determine the constitutionality of regulations implementing the national do-not-call registry, since "[f]ar from being an impermissible regulation of speech, the registry merely works to prevent 'a form of trespass.'" NAAG Comments at 34. We would note, however, that the Supreme Court has analyzed other measures

of Appeals decision that has considered First Amendment challenges to the TCPA.[204]

64. Under the framework established in *Central Hudson*, a regulation of commercial speech will be found compatible with the First Amendment if (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulations are not more extensive than necessary to serve that interest.[205] Under the first prong, we find that there is a substantial governmental interest in protecting residential privacy. The Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into

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that protected residential privacy as restrictions on commercial speech. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (applied *Central Hudson* analysis to Florida Bar rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident.) *See also State of Missouri v. American Blast Fax*, 323 F.3d 649 (8th Cir. 2003) (*American Blast Fax*), *pet. for rehearing pending* and *Destination Ventures* v. *Federal Communications Commission*, 46 F.3d 54 (9th Cir.1995) (*Destination Ventures*), where both the Eighth and Ninth Circuits applied the *Central Hudson* analysis to the TCPA provisions banning unsolicited fax advertising.

[204] *See Kathryn Moser v. Federal Communications Commission*, 46 F.3d 970 (9th Cir. 1995) (*Moser*) *cert. denied*, 515 U.S. 1161 (1995) (upholding ban on prerecorded telephone calls); *American Blast Fax* (upholding ban on unsolicited fax advertising) and *Destination Ventures* (upholding ban on unsolicited fax advertising).

[205] *Central Hudson*, 447 U.S. at 566. Specifically, the Court found that "[f]or commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. If both inquiries yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at 557.

their homes and that the government may protect this freedom."[206]

65. In particular, the government has an interest in upholding the right of *residents* to bar unwanted speech from their homes. In *Rowan v. United States Post Office*, the Supreme Court upheld a statute that permitted a person to require that a mailer remove his name from its mailing lists and stop all future mailings to the resident:

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. . . . In effect, Congress has erected a wall–or more accurately permits a citizen to erect a wall–that no advertiser may penetrate without his acquiescence.[207]

66. Here, the record supports that the government has a substantial interest in regulating telemarketing calls. In 1991, Congress held numerous hearings on telemarketing, finding, among other things, that "[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day" and "[u]nrestricted telemarketing can be an intrusive invasion of privacy

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[206] *Frisby v. Schultz*, 487 U.S. 474, 485. *See also Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home, ... the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

[207] *Rowan v. United States Post Office*, 397 U.S. 728 at 737-738 (1970); *see also Martin v. City of Struthers*, 319 U.S. 141 (1943), in which the Court struck down a ban on door-to-door solicitation because it "substituted the judgment of the community for the judgment of the individual householder," *id.* at 144, but noted in *dicta* that a regulation "which would make it an offense for any person to ring a bell of a householder who has appropriately indicated that he is unwilling to be disturbed" would be constitutional. *Id.* at 148.

and, when an emergency or medical assistance telephone line is seized, a risk to public safety.[208] Our record, like the FTC's, demonstrates that telemarketing calls are even more of an invasion of privacy than they were in 1991. The number of daily calls has increased five fold (to an estimated 104 million), due in part to the use of new technologies, such as predictive dialers.[209] An overwhelming number of consumers in the approximately 6,500 commenters in this proceeding support the adoption and implementation of a national do-not-call registry. In addition to citing concerns about the numerous and ever-increasing number of calls, they complain about the inadequacies of the company-specific approach, the burdens of such calls on the elderly and people with disabilities, and the costs of acquiring technologies to reduce the number of unwanted calls.[210] Accordingly, we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest.

67. Under *Central Hudson's* second prong, we find that the Commission's regulations directly advance the substantial government interest. Under this prong, the government must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[211] It may justify the restrictions on speech "based solely on history, consensus, and 'simple common sense.'"[212] Creating and implementing a national do-not-call registry will directly advance the government's interest in protecting residential privacy from unwanted telephone solicitations. Congress,

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[208] H.R. REP. NO. 102-317 at 2 (1991).

[209] *See supra* para. 8.

[210] *See supra* para. 19.

[211] *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995) (citations omitted).

[212] *Id.* at 628 (citation omitted).

consumers, state governments and the FTC have reached the same conclusion. The history of state administered do-not-call lists demonstrates that such do-not-call programs have a positive impact on the ability of many consumers to protect their privacy by reducing the number of unwanted telephone solicitations that they receive each day.[213] As noted above, Congress has reviewed the FTC's decision to establish a national do-not-call list and concluded that the do-not-call initiative will provide significant benefits to consumers throughout the United States.[214] We reject the arguments that because our do-not-call registry provisions do not apply to tax-exempt nonprofit organizations, our regulations do not directly and materially advance the government interest of protecting residential privacy.[215] "Government [need not] make progress on every front before it can make progress on any front."[216]

68. We believe that the facts here are easily distinguishable from those in *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995) and *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In *Coors*, the Court struck down a prohibition against disclosure of alcoholic content on labels

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[213] *See, e.g.*, Brenda J. Donat Comments; Alice and Bill Frazee Comments; Tammy Packett Comments.

[214] *See e.g.*, H.R. REP. NO. 108-8 at 3 (2003), *reprinted in* 2003 U.S.C.C.A.N. 688, 670 ("[i]t is the strongly held view of the Committee that a national do-not-call list is in the best interest of consumers, businesses and consumer protection authorities. This legislation is an important step toward a one-stop solution to reducing telemarketing abuses.").

[215] *See, e.g.*, ATA Comments at 85-88 and WorldCom Comments at 27-33.

[216] *United States v. Edge Broadcasting Company*, 509 U.S. 418, 434 (1993). *See also Moser v. FCC*, 46 F.3d at 975 ("Congress may reduce the volume of telemarketing calls without completely eliminating the calls.").

or in advertising that applied to beer but not to wine or distilled spirits, finding that "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve [the Government's interest in combating strength wars.]" In *Discovery Network*, the Court struck down an ordinance which banned 62 newsracks containing commercial publications but did not ban 1,500-2,000 newsracks containing newspapers, finding that "the distinction bears no relationship *whatsoever* to the particular [aesthetic] interests that the city has asserted." Here, Congress' decision to exclude tax-exempt nonprofit organizations from the definition of telemarketing in the TCPA was both rational and related to its interest in protecting residential privacy. The House Report finds that "the record suggests that most unwanted telephone solicitations are commercial in nature. . . .[T]he Committee also reached the conclusion, based on the evidence, that. . . . calls [from tax-exempt nonprofit organizations] are less intrusive to consumers because they are more expected. Consequently, the two main sources of consumer problems–high volume of solicitations and unexpected solicitations–are not present in solicitations by nonprofit organizations."[217]

69. Commenters in our record also express the concern that subjecting tax-exempt nonprofit organizations to the national do-not-call requirements may sweep too broadly because it would prompt some consumers to accept blocking of non-commercial, charitable calls to which they might not otherwise object as an undesired effect of registering on the national database to stop unwanted commercial solicitation calls. Both the Eighth and the Ninth Circuits found that the provisions of the TCPA, which bans unsolicited commercial faxes but not non-commercial faxes, directly advance a substantial government interest,[218] and we believe that

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[217] H.R. REP. NO. 102-317 at 16 (1991).

[218] *See American Blast Fax* and *Destination Ventures*.

the same distinction may be applied to the national do-not-call registry.[219]

70. We find under the third prong of the *Central Hudson* test that our proposed regulations are not more extensive than necessary to protect residential privacy. The Supreme Court has made clear that with respect to this prong, "the differences between commercial speech and noncommercial speech are manifest."[220] The Court held that:

> [T]he least restrictive means test has no role in the commercial speech context. What our decisions require, instead, is a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . . [T]he existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is

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[219] We reject Vector's argument that because its direct sellers and others make a *de minimis* number of calls relative to the high-volume of calls that telemarketers make, that the national do-not-call registry, as applied to companies like Vector's, "would not directly or materially advance the government's interest." Vector Comments at 12-13. The Supreme Court has held, in applying *Central Hudson's* second prong, that the state does not have to demonstrate that the government's interest is advanced as applied to every case. *See Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) ("[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case."); *Edge Broadcasting*, 509 U.S. 418, *discussing Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) ("[T]he State was entitled to protect its interest by applying a prophylactic rule to those circumstances generally; we declined to go further and to prove that the state interests supporting the rule actually were advanced by applying the rule in . . . [the] particular case.").

[220] *Florida Bar*, 515 U.S. 618, 632.

> certainly a relevant consideration in determining whether the fit between the ends and means is reasonable.[221]

In *Florida Bar*, the Supreme Court found that a prohibition against lawyers using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident was not more extensive than necessary to "protect. . . . the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."[222] Similarly, the Ninth Circuit has found that the TCPA's ban on prerecorded telemarketing calls constitutes a "reasonable fit" with the government's legitimate interest in protecting residential privacy.[223]

71. Here, we find that our regulations meet the requirements of *Central Hudson's* third prong. Pursuant to our regulations, we adopt a single, national do-not-call database that we will enforce jointly with the FTC. Our rules mandate that common carriers providing telephone exchange service shall inform their subscribers of their right to register on the database either through a toll-free telephone call or over the Internet. Furthermore, telemarketers and sellers must gain access to telephone numbers in the national database and will be able to do so by means of a fully automated, secure website dedicated to providing information to these entities. In addition, sellers will be assessed an annual fee based upon the number of area codes they want to assess, with the

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[221] *Id.*

[222] *Id.* at 624.

[223] *Moser*, 46 F.3d at 975; *see also American Blast Fax*, 323 F.3d at 658-60 (TCPA's ban on unsolicited faxes was not more extensive than necessary to "prevent . . . unwanted fax advertising from shifting advertising costs to unwilling consumers and interfering with their fax machines."); *Destination Ventures* (FCC sustained its burden of demonstrating reasonable fit between interest in preventing shift of advertising costs to consumers and banning unsolicited commercial faxes.)

maximum annual fee capped at $7,250. Our rules also provide that the national database will be updated continuously, and telemarketers must update their lists quarterly. We find that our regulations are a reasonable fit between the ends and means and are not as restrictive as the bans upheld in the cases cited above. In *Florida Bar*, the Supreme Court upheld an *absolute* ban against lawyers using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. Similarly, the Ninth Circuit has upheld the TCPA's *absolute* ban on prerecorded telemarketing calls, and both the Eighth and Ninth Circuit have upheld the TCPA's *absolute* ban on unsolicited faxes. Here, our regulations do not absolutely ban telemarketing calls. Rather, they provide a mechanism by which individual consumers may choose not to receive telemarketing calls. We also note that there are many other ways available to market products to consumers, such as newspapers, television, radio advertising and direct mail.[224] In addition, there simply are not "numerous and obvious less-burdensome alternatives" to the national do-not-call registry. The record clearly demonstrates widespread consumer dissatisfaction both with the effectiveness of the current company-specific rules that are currently in place[225] and the effectiveness and expense of certain technological alternatives to reduce telephone solicitations.[226] We also note that many of the "burdens" of the national do-not-call registry–issues concerning its costs, accuracy, and privacy–have been addressed by advances in computer technology and software over the last ten years.[227] Thus, we find that our regulations

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[224] *See Florida Bar*, 515 U.S. at 633-34.

[225] *See supra* para. 19.

[226] *See supra* para. 39.

[227] *See supra* paras. 30-32. We also reject Vector's argument that the failure in our rules to provide an exemption for direct sellers and others who make a *de minimis* number of calls means that our regulations do not meet the requirement of *Central Hudson's* third prong of being "narrowly

implementing the national do-not-call registry are consistent with the First Amendment and the framework established in *Central Hudson*.

72. Furthermore, we reject the arguments that the *Central Hudson* framework is not appropriate and that strict scrutiny is required because the regulations implementing the national do-not-call list are content-based, due to the TCPA's exemptions for non-profit organizations and established business relationships.[228] For support, commenters cite to *Discovery Network*, 507 U.S. 410, in which the Court struck down Cincinnati's ordinance which banned newsracks containing commercial publications but did not ban newsracks containing newspapers. The Court found that the regulation could neither be justified as a restriction on commercial speech under *Central Hudson*, nor could it be upheld as a valid time, place, or manner restriction on protected speech.[229] The Court explained that "the government may impose reasonable restrictions on the time, place or manner of

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tailored to ensure that . . . [they are]. . . no more extensive than necessary to serve the governmental interest." Vector Comments at 10, quoting *Central Hudson*, 447 U.S. at 565-66. As stated above, the Supreme Court requires a "not necessarily perfect but, reasonable" fit, *Florida Bar*, 515 U.S. at 632. In upholding a ban which prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident, even in cases where the injuries or grief was relatively minor, the Court held that, "We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. . . . The Bar's rule is reasonably well tailored to its stated objective." *Id.* at 633. Similarly, we find our regulations implementing the national do-not-call registry do not need to provide for an exemption for direct sellers and others who make a *de minimis* number of calls in order to be a "reasonable fit" between the governmental ends and means.

[228] *See* ATA Comments at 64-79 and WorldCom Comments at 36-38.

[229] *City of Cincinnati v. Discovery Network Inc. et al,* 507 U.S. 410 at 430 (1993).

engaging in protected speech provided that they are adequately justified 'without reference to the content of the regulated speech.'"[230] In this case, the Court held that the City's ban which covered commercial publications but not newspapers was content-based.[231] "It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral."[232]

73. Here, however, there was a neutral justification for Congress' decision to exclude non-profit organizations. As we noted *supra*, Congress found that "the two sources of consumer problems–high volume of solicitations and unexpected solicitations–are not present in solicitations by nonprofit organizations."[233] Congress also made a similar

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[230] *Id.* at 428 (citation omitted).

[231] *Id.* at 429.

[232] *Id.* at 429-30.

[233] H.R. REP. NO. 102-317, at 16 (1991). ATA asserts that we cannot give weight to Congress' findings to support our decision to exclude non-profit organizations from our regulations implementing the do-not-call registry. ATA Comments at 60-61. ATA argues that we may only consider the record compiled in this proceeding and that its market survey of consumer attitudes regarding telemarketing commissioned in November 2002 calls into question the validity of the Congressional findings distinguishing between non-profit and commercial calls. ATA Comments at 73-74. We disagree. As a preliminary matter, it is not clear to us that ATA's data support its assertion that consumers make no distinction between commercial and charitable calls. For example, while ATA does not provide exact data, it appears from the bar graph illustrating the data that approximately twice as many consumers find charitable calls "more acceptable" than other types of unsolicited calls than find commercial calls "more acceptable" than other types of unsolicited calls (approximately 18% v. 9%). The Congressional findings were supported by a poll undertaken by the National Association of Consumer Agency Administrators of its state level members for statistical data describing the extent to which consumer complaints about unsolicited telemarketing calls involved commercial, charitable, or political calls.

finding with respect to solicitations based on established business relationships.[234] Consumers are more likely to anticipate contacts from companies with whom they have an existing relationship and the volume of such calls will most likely be lower. Furthermore, as the Eighth Circuit noted when it distinguished the *Discovery Network* case in upholding the TCPA's ban on unsolicited faxes that applies to commercial speech but not to noncommercial speech, "the government may regulate one aspect of a problem without regulating all others."[235] Thus, we believe it is clear that our do-not-call registry regulations may apply to commercial solicitations without applying to tax-exempt nonprofit

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The evidence showed that the overwhelming majority of consumer complaints were about commercial calls. H.R. REP. NO. 102-137 at 16. Both the Eighth and Ninth Circuits have credited Congress' findings relating to the TCPA. *See American Blast Fax*, 323 F.3d at 655-656 (citing Congress' evidence in upholding the distinction between commercial and non-commercial faxes in the TCPA) and *Moser v. FCC*, 46 F.3d at 974 (finding that "[t]here was significant evidence before Congress of consumer concerns about telephone solicitation" before the passage of the TCPA). "When Congress makes findings on essentially factual issues . . . those findings are entitled to a great deal of deference, inasmuch as Congress as an institution is better equipped to amass and evaluate the vast amounts of data." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). We also note that in its *1992 TCPA Order*, the Commission stated that no evidence had been presented to show that non-commercial calls represented as serious a concern for telephone subscribers as unsolicited commercial calls and unsolicited commercial calls and concluded, based on the comments and the legislative history of the TCPA, that it would not seek additional authority to curb calls by tax-exempt organizations. TCPA Order, 7 FCC Rcd at 8773-8774, para. 40. Congress recently reaffirmed this judgment by requiring us "to maximize consistency" with the rule promulgated by the Federal Trade Commission, which contains an exemption for non-profit organizations.

[234] *Id.* at 14.

[235] *Missouri ex rel. v. American Blast Fax*, 323 F.3d at 656 n.4 (*citing United States v. Edge Broad. Co.*, 509 U.S. 418 at 434).

solicitations, and that such regulations are not subject to a higher level of scrutiny. Indeed, we agree with the FTC that regulation of non-profit solicitations are subject to a higher level of scrutiny than solicitations of commercial speech,[236] and "greater care must be given [both] to ensuring that the governmental interest is actually advanced by the regulatory remedy, and [to] tailoring the regulation narrowly so as to minimize its impact on First Amendment rights."[237]

5. Consistency with State and FTC Do-Not-Call Rules

74. We conclude that harmonization of the various state and federal do-not-call programs to the greatest extent possible will reduce the potential for consumer confusion and regulatory burdens on the telemarketing industry.[238] An underlying concern expressed by many commenters in this proceeding is the potential for duplication of effort and/or inconsistency in the rules relating to the state and federal do-not-call programs. Congress has indicated a similar concern in requiring the Commission to "maximize consistency" with the FTC's rules.[239] As discussed below, we find that the use of

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[236] *FTC Order*, 68 Fed. Reg. at 4636, n. 675, *quoting from Metromedia v. San Diego*, 453 U.S. 490, 513 (1981) ("[I]nsofar as it regulates commercial speech, the San Diego ordinance meets the constitutional requirements of *Central Hudson* . . . . It does not follow, however, that San Diego's ban on signs carrying noncommercial advertising is also valid . . ." Commercial speech cases have consistently accorded noncommercial speech a greater a greater degree of protection than commercial speech.") and *citing Watchtower Bible and Tract Soc'y v. Village of Stratton*, 122 S.Ct. 2080 (summarized by the FTC Order as "the Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a permit before doing so, the Court went out of its way to suggest that the ordinance may have been constitutional if it were limited to commercial speech.").

[237] *FTC Order*, 68 Fed. Reg. at 4636.

[238] Thirty-six states have adopted no-call laws.

[239] *See* Do-Not-Call Act, Sec. 3.

a single national database of do-not-call registrants will ultimately prove the most efficient and economical means for consumer registrations and access for compliance purposes by telemarketing entities and regulators.

75. The states have a long history of regulating telemarketing practices, and we believe that it is critical to combine the resources and expertise of the state and federal governments to ensure compliance with the national do-not-call rules. In fact, the TCPA specifically outlines a role for the states in this process.[240] In an effort to reconcile the state and federal roles, we have conducted several meetings with the states and FTC.[241] We expect such coordination to be ongoing in an effort to promote the continued effectiveness of the national do-not-call program. We clarify below the respective governmental roles in this process under the TCPA. As noted above, we intend to develop a Memorandum of Understanding with the FTC in the near future outlining the respective federal responsibilities under the national do-not-call rules. We note that a few commenters have expressed concern that the FTC and this Commission may adopt separate national do-not-call lists.[242] We reiterate here that there will be only one national database.

76. *Use of a Single Database.* We conclude that the use of a single national do-not-call database, administered by the vendor selected by the FTC, will ultimately prove the most efficient and economical means for consumer registrations and access by telemarketers and regulators. The establishment

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[240] *See* 47 U.S.C. § 227(e) and (f).

[241] *See* Letter from James Bradford Ramsay, NARUC General Counsel, to FCC filed March 14, 2003 (NARUC *ex parte*); NARUC Winter Committee Meetings, February 23-26, 2003, at which FCC and FTC staff discussed the national do-not-call registry and ways to harmonize federal and state programs. *See also* FTC Further Comments.

[242] *See, e.g.*, AARP Comments at 3; Visa Comments at 1-3.

of a single database of registrants will allow consumers to register their requests not to be called in a single transaction with one governmental agency. In addition, telemarketers may access consumer registrations for purposes of compliance with the do-not-call rules through one visit to a national database. This will substantially alleviate the potential for consumer confusion and administrative burden on telemarketers that would exist if required to access multiple databases. In addition, we note that section 227(e)(2) prohibits states, in regulating telephone solicitations, from using any database, list, or list system that does not include the part of such single national database that relates to that state.[243] Thus, pursuant to this requirement, any individual state do-not-call database must include all of the registrants on the national database for that state. We determine that the administrator of the national database shall make the numbers in the database available to the states as required by the TCPA.[244]

77. We believe the most efficient way to create a single national database will be to download the existing state registrations into the national database. The FTC has indicated that the national database is designed to allow the states to download into the national registry–at no cost–the telephone numbers of consumers that have registered with their state do-not-call lists.[245] As noted above, we believe that consumers, telemarketers, and regulators will benefit from the efficiencies derived from the creation of a single do-not-call database. We encourage states to work diligently toward this goal. We recognize that a reasonable transition period may be required to incorporate the state registrations in a few states

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[243] *See* 47 U.S.C. § 227(e)(2).

[244] *See* new rule at 47 C.F.R. § 64.1200(h).

[245] *FTC Order*, 68 Fed. Reg. at 4641. Approximately 19.2 million consumers have registered on state do-not-call lists.

into the national database.[246] We therefore adopt an 18-month transition period for states to download their state lists into the national database. Having an 18-month transition period will allow states that do not have full-time legislatures to complete a legislative cycle and create laws that would authorize the use of a national list. In addition, this transition period is consistent with the amount of time that the FTC anticipates it would take to incorporate the states' lists into the national database. Although we do not preempt or require states to discontinue the use of their own databases at this time, once the national do-not-call registry goes into effect, states may not, in their "regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of [the national do-not-call registry] that relates to [each] State."[247] As noted above, we believe that there are significant advantages and efficiencies to be derived from the creation and use of a single database for all parties, including states, and we strongly encourage states to assist in this effort. The Commission intends to work diligently with the states and FTC in an effort to establish a single do-not-call database.

78. *Interplay of State and Federal Do-Not-Call Regulations*. In the *2002 Notice*, we generally raised the issue of the interplay of state and federal do-not-call statutes and regulations.[248] In response, several parties argued that state regulations must or should be preempted in whole,[249] or at

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[246] The FTC estimates that many states will be able to transfer their do-not-call registrations to the national database prior to its implementation on October 1, 2003. For other states it may take from 12 to 18 months to achieve this result. *FTC Order*, 68 Feg. Reg. at 4641.

[247] *See* 47 U.S.C. § 227(e)(2).

[248] *See 2002 Notice*, 17 FCC Rcd at 17493-96, paras. 60-66.

[249] *See, e.g.*, DMA Reply Comments at 5. *See also* Nextel Comments at 4-6; Visa Comments at 3-4; Wells Fargo Comments at 1-2; Xpedite Comments at 14-16 (arguing that the Commission should preempt to

least in part,[250] and several other parties argued that the Commission cannot or should not preempt.[251] For example, several industry commenters contend that the TCPA provides the Commission with the authority to preempt state do-not-call regulations.[252] These commenters contend that Congress intended the TCPA to occupy the field or, at the very least, intended to preempt state regulation of interstate telemarketing. Many state and consumer commenters note, however, that the TCPA contemplates a role for the states in regulating telemarketing and specifically prohibits preemption of state law in certain instances.[253] States and consumers note that state do-not-call regulations have been a successful initiative in protecting consumer privacy rights. In addition, several

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create more uniform rules). We note that, although Bank One raises its preemption arguments, in part, by referencing the Commerce Clause, its analysis clearly focuses on the Commission's' authority under the Communications Act to preempt. ("Congress' general power to regulate interstate commerce *and* its delegation of that authority to the FCC in the Communications Act of 1934." Bank One Further Comments at 5.) Moreover, to the extent Bank One suggests that, in the absence of federal statutory preemption, the Commerce Clause operates to preempt states from unduly burdening interstate commerce, such a finding would require a more particularized showing with regard to the specific statute at issue and the burden on interstate commerce. *See e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (considering whether state statute that prohibited oil producers and refiners from operating retail gas stations impermissibly burdened interstate commerce.).

[250] *See, e.g.*, WorldCom Reply Comments at 27-30 (arguing that state do-not-call lists are preempted by operation of law to the extent they purport to regulate interstate calls).

[251] *See, e.g.*, NAAG Comments at 12; Attorney General of Indiana Further Reply Comments.

[252] *See, e.g.*, American Express Comments at 2-3; Nextel Comments at 4-5; Visa Reply Comments 8-9.

[253] *See, e.g.*, NAAG Comments at 12; NARUC Comments at 3-4; North Dakota PSC Comments at 2; Attorney General of Indiana Further Reply Comments.

commenters note the importance of federal and state cooperation in enforcing the national do-not-call regulations.[254] The record also indicates that states have historically enforced their own state statutes within, as well as across state lines.[255] The statute also contains a savings clause for state proceedings to enforce civil or criminal statutes, [256] and at least one federal court has found that the TCPA does not preempt state regulation of autodialers that are not in actual conflict with the TCPA.[257]

79. The main area of difference between the state and federal do-not-call programs relates to the exemptions created from the respective do-not-call regulations. Some state regulations are less restrictive by adopting exemptions that are not recognized under federal law. For example, some states have adopted exemptions for insurance agents, newspapers, or small businesses.[258] In addition, a few states have enacted laws that are more restrictive than the federal regulations by not recognizing federal exemptions such as the

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[254] *See, e.g.* NARUC Comments at 3-4; North Dakota PSC Comments at 2; OPCDC Comments at 3; Texas PUC Comments. In addition, a large number of consumers filed comments in this proceeding indicating that state do-not-call regulations have improved their privacy rights. *See, e.g.*, Brenda J. Donat Comments (cancer patient appreciates reduction in calls due to Indiana Telephone Privacy Act); Alice and Bill Frazee Comments; Tammy Puckett Comments (Indiana law provides for quiet for terminally ill family member).

[255] *See* NAAG Comments at 2. NAAG estimates that approximately 150 state enforcement actions have been taken against telemarketing companies call across state lines.

[256] 47 U.S.C. § 227(f)(6)("Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.").

[257] *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547-48 (8th Cir. 1995).

[258] Ala. Code 1975 § 8-19A-4; Ark. Code Ann. § 4-99-103; Fla. Stat. Ann. § 501.604.

established business relationship.[259] Most states, however, exempt nonprofit organizations and companies with whom the consumer has an established business relationship in some manner consistent with federal regulations.[260]

80. At the outset, we note that many states have not adopted any do-not-call rules. The national do-not-call rules will govern exclusively in these states for both intrastate and interstate telephone solicitations.[261] Pursuant to section 227(f)(1), all states have the ability to enforce violations of the TCPA, including do-not-call violations, in federal district court.[262] Thus, we conclude that there is no basis for conflict regarding the application of do-not-call rules in those states that have not adopted do-not-call regulations.

81. For those states that have adopted do-not-call regulations, we make the following determinations. First, we conclude that, by operation of general conflict preemption law, the federal rules constitute a floor, and therefore would supersede all less restrictive state do-not-call rules.[263] We believe that any such rules would frustrate Congress' purposes and objectives in promulgating the TCPA. Specifically, application of less restrictive state exemptions directly conflicts with the federal objectives in protecting

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[259] Ind. Code § 24-4.7-1-1 (no EBR exception); Idaho Code § 48-1003A (nonprofit exception for minors only).

[260] Alaska Stat. § 45.50.475; Vt. Stat. Ann. tit. 9 § 2464a; Kan. Stat. Ann. § 50-670 and § 50-671.

[261] Section 2(b) provides the Commission with the authority to apply the TCPA to intrastate communications. *See* 47 U.S.C. § 152(b).

[262] 47 U.S.C. § 227(f)(1).

[263] *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

consumer privacy rights under the TCPA. Thus, telemarketers must comply with the federal do-not-call rules even if the state in which they are telemarketing has adopted an otherwise applicable exemption. Because the TCPA applies to both intrastate and interstate communications, the minimum requirements for compliance are therefore uniform throughout the nation. We believe this resolves any potential confusion for industry and consumers regarding the application of less restrictive state do-not-call rules.

82. Second, pursuant to section 227(e)(1), we recognize that states may adopt more restrictive do-not-call laws governing intrastate telemarketing.[264] With limited exceptions, the TCPA specifically prohibits the preemption of any state law that imposes more restrictive intrastate requirements or regulations. Section 227(e)(1) further limits the Commission's ability to preempt any state law that prohibits certain telemarketing activities, including the making of telephone solicitations. This provision is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls,[265] and is silent on the issue of whether state law that imposes more restrictive regulations on

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[264] 47 U.S.C. § 227(e)(1).

[265] Section 227(e)(1) provides that:

(e) Effect on State Law.–

(1) State Law Not Preempted.–Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

interstate telemarketing calls may be preempted. As set forth below, however, we caution that more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules.

83. We recognize that states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls.[266] Here, Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls.[267] Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. [268] We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket

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[266] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).

[267] S. REP. NO. 102-178, at 3; *see also id.* at 5 ("Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls."); Cong. Rec. S16205 (Nov. 7, 1991) (remarks of Sen. Hollings) ("State law does not, and cannot, regulate interstate calls."); TCPA § 2(7) (finding that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation.").

[268] *See, e.g.*, 137 Cong. Rec. S18317-01, at 1 (1991) (remarks of Sen. Pressler) ("The Federal Government needs to act now on uniform legislation to protect consumers.").

on a nationwide or multi-state basis creates a substantial compliance burden for those entities.[269]

84. We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. We reiterate the interest in uniformity–as recognized by Congress–and encourage states to avoid subjecting telemarketers to inconsistent rules.

85. NAAG contends that states have historically enforced telemarketing laws, including do-not-call rules, within, as well as across, state lines pursuant to "long-arm" statutes.[270] According to NAAG, these state actions have been met with no successful challenges from telemarketers. We note that such "long-arm" statutes may be protected under section 227(f)(6) which provides that "nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state."[271] Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with

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[269] *See, e.g.*, AWS Further Comments at 7 (separate state requirements will confuse customers and increase costs and burdens for telemarketers); Intuit Further Comments at 2-4 (Congress intended that more restrictive state laws be preempted); Visa Further Comments at 8 (contending that state lists that are inconsistent with federal requirements should be preempted).

[270] NAAG Comments at 12.

[271] 47 U.S.C. § 227(f)(6).

the TCPA and the rules established under this order in state court.

IV. COMPANY SPECIFIC DO-NOT-CALL LISTS

A. Background

86. In the *1992 TCPA Order*, the Commission adopted a "company-specific do-not-call" approach to protect residential telephone subscriber privacy by requiring telemarketers to place consumers on a do-not-call list if the consumer requests not to receive future solicitations.[272] In the *2002 Notice*, the Commission sought comment on whether the company-specific approach has proven effective in providing consumers with a means to curb unwanted telephone solicitations.[273] The Commission noted that under the company-specific approach, consumers must repeat their request not to be called on a case-by-case basis. Given the apparent increase in telemarketing calls, the Commission requested comment on whether this approach continues to balance adequately the interests of consumers with those of legitimate telemarketers. In particular, the Commission

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[272] *1992 TCPA Order*, 7 FCC Rcd at 8765-66, para. 23. Specifically, the Commission's rules require that persons or entities engaged in telephone solicitations must have a written policy available upon demand for maintaining a do-not-call list, must inform and train any personnel engaged in telephone solicitations in the existence and use of the list, and must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. 47 C.F.R. § 64.1200(e)(2)(i)–(iii). In addition, the Commission's rules require that a do-not-call request be honored for a period of ten years from the date of the request. 47 C.F.R. § 64.1200(e)(2)(vi). In the absence of a specific request by the subscriber to the contrary, a do-not-call request applies to the particular business entity making the call or on whose behalf the call is made, and does not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised. 47 C.F.R. § 64.1200(e)(2)(v).

[273] *2002 Notice*, 17 FCC Rcd at 17468-72, paras. 13-20.

sought comment on whether changes in the marketplace now make this approach unreasonably burdensome for consumers, including elderly and disabled consumers.[274] In addition, the Commission sought comment on whether the company-specific approach should be retained if the FTC, either acting alone or in conjunction with this Commission, adopts a national do-not-call list. Finally, the Commission sought comment on whether to consider any additional modifications to the company-specific list such as requiring companies to provide a toll-free number or website to register such requests.[275]

87. In response to the *2002 Notice*, the Commission received a number of comments relating to the company-specific do-not-call rules. The majority of individual consumers addressing these issues contend that the current company-specific approach is inadequate to prevent unwanted telephone solicitations.[276] In general, they argue that the company-specific approach is extremely burdensome to consumers who must repeat their request to every telemarketer that calls; such requests are often ignored or, in the case of abandoned calls, there is no opportunity to make such a request; and that consumers have no way to verify whether they have been placed on such lists.[277] In addition, many consumers contend that telemarketers often fail to identify themselves or provide written copies of their do-not-call policies as required by the Commission's rules.[278]

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[274] *2002 Notice*, 17 FCC Rcd at 17469-70, paras. 14-15.

[275] *2002 Notice*, 17 FCC Rcd at 17470, para. 17.

[276] Lyle Bickley Comments; Pete Nico, Jr. Comments.

[277] *See, e.g.*, James D. Gagnon Comments; Norman C. Hamer Comments; Rosanna Santiago Comments; Elizabeth J. Yocam Comments.

[278] *See, e.g.*, Harley H. Cudney Comments (telemarketers fail to identify themselves); Timothy Walton Comments (telemarketers failure to send do-not-call policy when requested).

Some consumers note that these limitations make it difficult to pursue any private right of action against telemarketers.[279] Commenters also indicate that telemarketers frequently inform them that it will take as long as two months to process their do-not-call requests.[280] An organization representing persons with disabilities contends that such consumers often cannot communicate requests not to be called to telemarketers.[281]

88. Many industry commenters contend that the company-specific approach has been effective and that a national do-not-call list is therefore unnecessary. These commenters argue that the advantages of the company-specific approach, as identified by the Commission in 1992, remain valid today. Specifically, these commenters contend that companies already maintain such lists, the company-specific approach allows consumers to halt calls selectively, businesses gain useful information about consumer preferences, consumer confidentiality is protected, and the costs remain on the telemarketer. A number of industry commenters request that the retention period for those consumers requesting not to be called be reduced from ten years.[282] In general, industry commenters oppose any requirement to establish a toll-free number or website for consumers to register and/or verify their do-not-call requests.[283] These commenters contend that any such requirement would be costly and unnecessary given their compliance with the existing rules.

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[279] Gregory S. Reichenbach Comments.

[280] Thomas M. Pechnik Comments at 2; Wayne Strang Comments at 4.

[281] *See* Telecommunications for the Deaf Comments at 2.

[282] *See, e.g.*, ATA Comments at 97-100; DMA Comments at 16-18; SBC Reply Comments at 6.

[283] *See, e.g,* Household Financial Comments at 3; MBA Comments at 6-7; Nextel Comments at 7-9; Qwest Comments at 6-7. *But see* MBNA Comments at 7.

89. The FTC concluded that its company-specific do-not-call rules should be retained despite the adoption of a national registry.[284] Although the FTC found that the company-specific list was often ineffective in protecting consumers, the FTC concluded it will work in a complementary fashion with a national do-not-call list to effectuate the appropriate balance between consumer privacy and enabling sellers to have access to customers. While the FTC has decided to exempt telemarketing calls on behalf of charitable organizations from the national registry, it concluded that calls by for-profit telemarketers on behalf of charitable organizations will now be subject to the company-specific rules.[285]

B. Discussion

1. Efficacy of the Company-Specific Rules

90. We conclude that retention of the company-specific do-not-call rules will complement the national do-not-call registry by providing consumers with an additional option for managing telemarketing calls. We believe that providing consumers with the ability to tailor their requests not to be called, either on a case-by-case basis under the company do-not-call approach or more broadly under the national registry, will best balance individual privacy rights and legitimate telemarketing practices. As a result, those consumers that wish to prohibit telephone solicitations from only certain marketers will continue to have the option to do so. In addition, consumers registered on the national do-not-call registry will have the opportunity to request that they not be called by entities that would otherwise fall within the established business relationship exemption by using the option to be placed on the company-specific lists. This finding is consistent with that of the FTC.

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[284] *FTC Order*, 68 Fed. Reg. at 4629.

[285] *FTC Order*, 67 Fed. Reg. at 4629.

91. As discussed above, we agree with those commenters that contend that the company-specific do-not-call approach has not proven ideal as a stand-alone method to protect consumer privacy. In particular, the increase in telemarketing calls over the last decade now places an extraordinary burden on consumers that do not wish to receive telephone solicitations. These consumers must respond on a case-by-case basis to request that they not be called. The record in this proceeding is replete with examples of consumers that receive numerous unwanted telemarketing calls each day.[286] In addition, the widespread use of predictive dialers now results in many "dead air" or hang-up calls in which consumers do not even have the opportunity to make a do-not-call request. Such calls are particularly burdensome for the elderly and disabled consumers. We believe, however, that the measures adopted elsewhere in this order will enhance the effectiveness of the company-specific list. For example, the adoption of a national do-not-call registry alleviates the concerns of those consumers, including elderly and disabled consumers that may find a case-by-case do-not-call option particularly burdensome. In addition, restrictions on abandoned calls will reduce the number of "dead air" calls. Caller ID requirements will improve the ability of consumers to identify and enforce do-not-call rights against telemarketers. We also note that although many commenters question the effectiveness of the company-specific approach, there is little support in the record to eliminate those rules based on the adoption of the national do-not-call list.[287] For the reasons stated above, we retain the option for consumers to request on a case-by-case basis whether they desire to receive telephone solicitations.

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[286] *See, e.g.*, Nancy J. Barginear Comments; David K. McClain Comments; John A. Rinderle Comments; Ryan Tobin Comments.

[287] *But see* Nextel Comments at 7 (contending that adoption of a national do-not-call list may render unnecessary any detailed company-specific requirements).

2. Amendments to the Company-Specific Rules

92. We agree with several industry commenters that the retention period for records of those consumers requesting not to be called should be reduced from the current ten-year requirement to five years.[288] As many commenters note, telephone numbers change hands over time and a shorter retention period will help ensure that only those consumers who have requested not to be called are retained on the list.[289] Both telemarketers and consumers will benefit from a list that more accurately reflects those consumers who have requested not to be called. The FTC has concluded and several commenters in this proceeding agree that five years is a more reasonable period to retain consumer do-not-call requests.[290] We believe a five-year retention period reasonably balances any administrative burden imposed on consumers in requesting not to be called with the interests of telemarketers in contacting consumers. As noted, a shorter retention period increases the accuracy of the database while the national do-not-call option mitigates the burden on those consumers who may believe more frequent company-specific do-not-call requests are overly burdensome. We believe any shorter retention period, as suggested by a few industry commenters, would unduly increase the burdens on consumers who would be forced to make more frequent renewals of their company-specific do-not-call requests without substantially improving the accuracy of the database. We therefore amend our rules to

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[288] *See, e.g.*, DMA Comments at 16; Electronic Retailing Association Comments at 5-6; Ohio PUC Comments at 17.

[289] *See, e.g.*, ABA Comments at 8; AGF Comments at 3; Call Compliance Comments at 7.

[290] *See, e.g.*, DMA Comments at 16; Electronic Retailing Association Comments at 5-6; Ohio PUC Comments at 17-18.

require that a do-not-call request be honored for five years from the time the request is made.[291]

93. We decline at this time to require telemarketers to make available a toll-free number or website that would allow consumers to register company-specific do-not-call requests or verify that such a request was made with the marketer. We also decline to require telemarketers to provide a means of confirmation so that consumers may verify their requests have been processed at a later date. Telemarketers should, however, confirm that any such request will be recorded at the time the request is made by the consumer. In addition, consumers calling to register do-not-call requests in response to prerecorded messages should be processed in a timely manner without being placed on hold for unreasonable periods of time. Although we believe the additional measures discussed above would improve the ability of consumers, including consumers with disabilities, to register do-not-call requests, we agree with those commenters that contend that such requirements would be unduly costly to businesses.[292] In particular, we are concerned with the costs imposed on small businesses. The Commission will, however, continue to monitor compliance with our company-specific do-not-call rules and take further action as necessary.

94. We conclude that telemarketers must honor a company-specific do-not-call request within a reasonable time of such request. We disagree, however, with commenters that suggest that periods of up to 90 days are a reasonable time required to process do-not-call requests.[293] Although some administrative

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[291] *See* amended rule at 47 C.F.R. § 64.1200(d)(6).

[292] *See, e.g.*, MBA Comments at 6; Nextel Comments at 7-9; Qwest Comments at 6-7.

[293] *See, e.g.*, Household Financial Services Comments at 3-4 (contending that it takes 90 days to process requests); Verizon Comments at 6 (45 days to process request).

time may be necessary to process such requests, this process is now largely automated.[294] As a result, such requests can often be honored within a few days or weeks. Taking into consideration both the large databases of such requests maintained by some entities and the limitations on certain small businesses, we conclude that a reasonable time to honor such requests must not exceed thirty days from the date such a request is made.[295] We note that the Commission's rules require that entities must record company-specific do-not-call requests and place the subscriber's telephone number on the do-not-call list at the time the request is made.[296] Therefore, telemarketers with the capability to honor such company-specific do-not-call requests in less than thirty days must do so.[297] We believe this determination adequately balances the privacy interests of those consumers that have requested not to be called with the interests of the telemarketing industry. Consumers expect their requests not to be called to be honored in a timely manner, and thirty days should be the maximum administrative time necessary for telemarketers to process that request.

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[294] *See, e.g.*, WorldCom Comments at 40.

[295] Consistent with our existing rules, such request applies to all telemarketing campaigns of the seller and any affiliated entities that the consumer reasonably would expect to be included given the identification of the caller and the product being advertised. 47 C.F.R. § 64.1200 (e)(2)(v). *See also* AGF Comments at 4 (indicating that a reasonable time to process requests is 30 days); MBNA Comments at 7 (reasonable time to process requests is a minimum of 30 days).

[296] 47 C.F.R. § 64.1200(e)(2)(iii).

[297] As noted above, the safe harbor period for compliance with the national do-not-call list is three-months. However, given that the national list will contain many more registrants than the individual company-specific lists, we believe that it is reasonable to allow some additional time for telemarketers to comply with the national do-not-call requests.

95. In addition, we decline to extend the company-specific do-not-call rules to entities that solicit contributions on behalf of tax-exempt nonprofit organizations. The TCPA excludes calls or messages by tax-exempt nonprofit organizations from the definition of telephone solicitation.[298] The Commission has clarified that telemarketers who solicit on behalf of tax-exempt nonprofit organizations are not subject to the rules governing telephone solicitations.[299] In the *2002 Notice*, the Commission declined to seek further comment on this issue.[300] We acknowledge that this determination creates an inconsistency with the FTC's conclusion to extend its company-specific requirements to entities that solicit contributions on behalf of tax-exempt nonprofit organizations. The Commission, however, derives its authority to regulate telemarketing from the TCPA. As noted above, that statute excludes tax-exempt nonprofit organizations from the definition of telephone solicitation. We therefore decline to extend the company-specific requirements to entities that solicit on behalf of tax-exempt nonprofit organizations. We note that some tax-exempt nonprofit organizations have determined to honor voluntarily specific do-not-call requests. Other organizations may find it advantageous to follow this example.

96. Finally, to make clear our determination that a company must cease making telemarketing calls to a customer with whom it has an established business relationship when that customer makes a do-not-call request, we amend the company-specific do-not-call rules to apply to any call for telemarketing purposes.[301] We also adopt a provision stating

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[298] *See* 47 U.S.C. § 227(a)(3)(C).

[299] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

[300] *2002 Notice*, 17 FCC Rcd at 17479, para. 33.

[301] *See* amended rule at 47 C.F.R. § 64.1200(d).

that a consumer's do-not-call request terminates the established business relationship for purposes of telemarketing calls even if the consumer continues to do business with the seller.[302]

V. INTERPLAY OF SECTIONS 222 AND 227

A. Background

97. In the *2002 Notice*, the Commission sought comment generally on the interplay between sections 222 and 227.[303] Section 222, entitled "Privacy of Consumer Information," obligates telecommunications carriers to protect the confidentiality of certain information and to protect the customer proprietary network information (CPNI) created by the customer-carrier relationship.[304] Under the CPNI rules, a

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[302] *See* amended rule at 47 C.F.R. § 64.1200(f)(3)(i).

[303] *2002 Notice*, 17 FCC Rcd at 17471-72, paras. 18-19.

[304] The Act defines CPNI as "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(h)(1)(A) and (B) (the 911 Act amended the definition of CPNI in section 222(h) to include "location" among a customer's information that carriers are required to protect under the privacy provisions of section 222). CPNI includes personal information such as the phone numbers called by a consumer, the length of phone calls, and services purchased by a consumer, such as call waiting. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 2000 Biennial Regulatory Review - Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket Nos. 96-115, 96-149, and 00-257, Third Report and Order and Third Further Notice of Proposed

customer may allow her carrier to use her CPNI for marketing purposes. Depending on the uses the carrier intends to make of the customer's CPNI, the carrier must provide the customer notice of her CPNI rights and a means to effectuate her CPNI choice–either "opt-in" or "opt-out" consent.[305] The TCPA, on the other hand, governs a particular method–telemarketing–by which carriers (and other companies) market to their customers, and those customers' rights to choose whether or not they wish to receive such telemarketing calls. Accordingly, a consumer's decision to allow her carrier to use her CPNI reflects whether she is willing to have her carrier look at her personal usage information in order to tailor its marketing[306] based on her usage patterns. A consumer's decision to enroll on the national do-not-call list reflects her decision about whether she wishes to receive telemarketing calls.

98. In the *2002 Notice*, the Commission tentatively concluded that a customer's request to be placed on a telecommunications carrier's do-not-call list limits that

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Rulemaking, 17 FCC Rcd 14860 at 14864, para. 7 (2002) (*CPNI Third Report and Order*).

[305] Opt-out approval and opt-in approval refer to methods of obtaining customer consent to use, disclose, or permit access to customers' CPNI. The opt-in approval method "requires that the carrier obtain from the customer affirmative, express consent allowing the requested CPNI usage, disclosure, or access after the customer is provided appropriate notification of the carrier's request consistent with the requirements" adopted by the Commission. 47 C.F.R. § 64.2003(h). Under the opt-out approval method "a customer is deemed to have consented to the use, disclosure, or access to the customer's CPNI if the customer has failed to object thereto within the waiting period [adopted by the Commission in 47 C.F.R. § 64.2009(d)(1)] after the customer is provided appropriate notification of the carrier's request for consent consistent with the rules" adopted by the Commission. 47 C.F.R. § 64.2003(i).

[306] Such marketing is not limited to telemarketing and may include direct mail or other marketing.

carrier's ability to market to that consumer via telephone.[307] The Commission reasoned that "[h]onoring a do not call request under section 227 does not render a consent under section 222 a nullity, but instead merely limits the manner of contact (i.e., marketing over the telephone) consistent with the express request of the customer under section 227."[308] Numerous commenters generally supported the Commission's tentative determination that a customer's section 222 approval to use his or her CPNI should not override that customer's request to be placed on a do-not-call list.[309] However, some commenters urged the Commission to draw distinctions based on: (1) the type of CPNI consent received (opt-in versus opt-out); and/or (2) national and state do-not-call lists versus company-specific do-not-call lists.

99. In particular, some commenters argued that a customer's CPNI approval should be deemed to override her request to be included on a national (or other general) do-not-call list, but should not override a request to be placed on a company-specific do-not-call list.[310] Additionally, some commenters supported an approach where a customer's CPNI approval, if obtained through an opt-out mechanism, would not overcome the customer's request to be placed on a do-not-call list; however, opt-in CPNI approval would be deemed to overcome a customer's inclusion on a do-not-call list.[311] A few commenters argued that any CPNI approval should be deemed to overcome a customer's inclusion on a

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[307] *2002 Notice,* 17 FCC Rcd at 17471-72, para. 19. The Commission noted that the carrier would still be able to market to that consumer in other ways (e.g., direct mail, e-mail, etc.). *Id.*

[308] *2002 Notice,* 17 FCC Rcd at 17471-72, para. 19.

[309] BellSouth Comments at 6; Verizon Comments at 16; Michael C. Worsham Comments at 3; Yellow Pages Comments at 6.

[310] Cingular Comments at 10; Sprint Comments at 15.

[311] AT&T Wireless Comments at 20-21.

do-not-call registry.[312] Finally, one commenter suggested that the question of the interplay between a customer's opt-in consent to use her CPNI and request to be on a do-not-call list should be judged on a customer-by-customer basis, based on which request was made most recently.[313]

B. Discussion

100. We first note that the fact that a telecommunications carrier has current CPNI about a particular consumer indicates that the consumer is a customer of that carrier. In that situation, there exists an established business relationship between the customer and the carrier.[314] The established business relationship is an exception to the national do-not-call registry.[315] However, based on the evidence in the record and as supported by numerous commenters,[316] we confirm our tentative conclusion that if a customer places her name on a carrier's do-not-call list, that request must be honored even though the customer may also have provided consent to use her CPNI under section 222.[317] By doing so, we maximize the protections and choices available to consumers, while giving maximum effect to the language of both statutes. At the outset, the average consumer seems rather unlikely to

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[312] Concerned Telephone Companies Comments at 1-8; NTCA Comments at 2 ("Offering opt-out consent to the consumer's telecommunications carrier under section 222 indicates an interest in receiving information on new services that may be available either now or in the future from the carrier.").

[313] NYSCPB Comments at 5.

[314] *See* 47 C.F.R. § 64.1200(f)(4). *See also infra* Section VI.

[315] *See supra* para. 42.

[316] BellSouth Comments at 6; Michael C. Worsham Comments at 3; Verizon Comments at 16; Yellow Pages Comments at 6.

[317] As one commenter stated "under the Commission's CPNI rules … a customer's CPNI consent does not equate to customer consent to receive telemarketing by that carrier." AT&T Wireless Comments at 19.

appreciate the interrelationship of the Commission's CPNI and do-not-call rules. Allowing CPNI consent to trump a do-not-call request would, therefore, thwart most consumers' reasonable expectations about how a company-specific do-not-call list functions. Equally important, permitting a consumer's CPNI consent to supercede a consumer's express do-not call request might undermine the carrier's do-not-call database as the first source of information about the consumer's telemarketing preferences.

101. As discussed *infra*, because we retain the exemption for calls and messages to customers with whom the carrier has an established business relationship,[318] the determination that a customer's CPNI approval does not trump her inclusion on a do-not-call list should have no impact on carriers' ability to communicate with their customers via telemarketing. [319] Carriers will be able to contact customers with whom they have an established business relationship via the telephone, unless the customer has placed her name on the company's do-not-call list; whether the customer has consented to the

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[318] *See infra* para. 112.

[319] We disagree with the Concerned Telephone Companies' assertion that a customer's CPNI consent equates to a "prior express invitation or permission" to be contacted. *See* Concerned Telephone Companies Comments at 2. As we discuss herein, a customer's CPNI consent indicates her willingness to have her telephone company use her CPNI in order to, among other things, tailor marketing proposals to her. CPNI approval, however, is not a blanket approval for any and all marketing a carrier may decide to pursue. A customer's affirmative decision to enroll on a do-not-call list is a much more direct and reliable indicator of a customer's willingness to receive marketing advances via the telephone. Accordingly, we disagree with the Concerned Telephone Companies' assertion that "consent given by a customer under the CPNI rules renders Section 227 constraints inapplicable." Concerned Telephone Companies Comments at 2.

use of her CPNI does not impact the carrier's ability to contact the customer via telemarketing.[320]

102. We are not persuaded by the arguments of those commenters who urge the Commission to find that CPNI consent should trump a customer's request to be placed on a do-not-call list or similarly, that CPNI consent equates to permission to market "without restriction."[321] We note that the Concerned Telephone Companies assert that CPNI consent equates to "consent to market *without restriction* based on [customers'] CPNI."[322] The Commission finds no support for this assertion in any Commission order or statutory provision and, as we discuss herein, we specifically determine that CPNI approval does not equate to unlimited consent to market without restriction.

103. Similarly, a number of commenters argue that a customer's CPNI authorization "covers a number of forms of

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[320] Some commenters equated obtaining customers' consent to use the customers' CPNI with having an established business relationship. *See* Nextel Comments at 16, section entitled "The Commission Should Interpret the Established Business Relationship Rules in a Manner Consistent With the Consent Requirements of the CPNI Rules." We concur with those commenters who argue that the carrier's established business relationship allows the carrier to contact those customers via telemarketing who have requested to be on the national do-not-call list. However, as we determine herein, the CPNI consent does not overcome or trump a customer's request to be included on the national do-not-call list. *See* Cingular Comments at 10; Nextel Comments at 17; Sprint Comments at 16 ("The view that telecommunications service providers should be allowed to contact their existing customers, even if such customers have asked to be placed on a general (non-company specific) DNC list, is consistent with the Commission's view of the importance of 'established business relationships.'").

[321] Concerned Telephone Companies Comments at 2; AT&T Wireless Reply Comments at 26.

[322] Concerned Telephone Companies Comments at 2 (emphasis added).

marketing, including telemarketing."[323] However, such assertions ignore the plain fact that CPNI approval deals specifically with a carrier's use of a customer's personal information, and only indirectly pertains to or arguably "authorizes" marketing to the customer. Do-not-call lists, on the other hand, speak directly to customers' preferences regarding telemarketing contacts.[324] Accordingly, we are convinced that a customer's do-not-call request demonstrates more directly her willingness (or lack thereof) to receive telemarketing calls, as opposed to any indirect inference that can be drawn from her CPNI approval.

104. Additionally, we disagree with those commenters who claim that allowing CPNI approval to trump a consumer's request to be on a national or state do-not-call list gives consumers greater flexibility.[325] As stated above, a carrier's established business relationship with a customer exempts the carrier from honoring the customer's national do-not-call request. However, as stated above, CPNI consent is not deemed to trump a carrier-specific do-not-call list request. For similar reasons, we decline to make a distinction based on what type of CPNI consent (opt-in versus opt-out) received, as some commenters urge.[326]

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[323] AT&T Wireless Reply Comments at 26-27.

[324] Yellow Pages Comments at 7 ("Consumers who do not want to receive solicitations via telephone are going to request to be placed on the do-not-call list, regardless of whether the consumer has consented to the use of their CPNI").

[325] AT&T Wireless Reply Comments at 27.

[326] AT&T Wireless Comments at 18-19 (contending that under circumstances where "the express opt-in CPNI consent includes customer consent to be contacted by telephone, AWS believes the carrier has the permission to contact the customer even if that customer has placed her name on either the carrier's or a national do-not-call list."). *See also* NYSCPB Comments at 5.

105. We do not allow carriers to combine the express written consent to allow them to contact customers on a do-not-call list with the CPNI notice in the manner that AT&T Wireless describes. However, we do allow carriers to combine in the same document CPNI notice with a request for express written consent to call customers on a do-not-call list, provided that such notices and opportunities for consumer consent are separate and distinct. That is, consumers must have distinct choices regarding both whether to allow use of their CPNI and whether to allow calls after registering a do-not-call request, but carriers may combine those requests for approval in the same notice document. Finally, we find a distinction based on the type of CPNI consent unnecessary here, as carriers can avail themselves of the established business relationship exception to contact their existing customers, irrespective of the type of CPNI consent obtained.

106. Similarly, we agree with those commenters[327] who advise against using a time element to determine whether a customer's do-not-call request takes precedence over the customer's opt-in approval to use her CPNI,[328] because adding a time element would unnecessarily complicate carrier compliance and allow carriers to game the system. In particular, the New York State Consumer Protection Board argues that "enrollment on a national do-not-call list should take precedence over the prior implied consent through the 'opt-out' procedure, but that the latest in time should prevail regarding 'opt-in' consents."[329] Because we determine that carriers can contact consumers with whom they have established business relationships, irrespective of those consumers' CPNI preferences, we find this proposed meth-

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[327] AT&T Wireless Reply Comments at 27.

[328] NYSCPB Comments at 5.

[329] NYSCPB Comments at 5.

odology unnecessary in determining whether a customer's CPNI consent should trump her do-not-call request. Additionally, we note that this proposal could be manipulated by carriers to overcome consumers' do-not-call preferences, by allowing carriers to send CPNI notices to customers that are intentionally timed to "overcome" previously expressed do-not-call requests.

107. Finally, although it was not directly raised in the *2002 Notice*, some commenters raised the issue of whether any type of do-not-call request revokes or limits a carrier's ability to use CPNI in a manner other than telemarketing.[330] To the degree such affirmation is necessary, we agree with those commenters who maintain that a carrier's ability to use CPNI is not impacted by a customer's inclusion on a do-not-call list, except as noted above.

108. *Constitutional Implications*. We disagree with those commenters who argue that our decision that a customer's CPNI approval does not trump her request to be on a do-not-call list violates the First Amendment rights of carriers and customers.[331] Commenters cite no authority to support their arguments, and we do not believe the fact that customers have given their approval for carriers to use their CPNI implicates any additional First Amendment issues beyond those discussed in Section III.B.4., *supra*. Accordingly, we find our rules implementing the do-not-call registry are consistent with the First Amendment as applied to any consumer, including those who have previously given their approval to carriers to use their CPNI, pursuant to section 222. Furthermore, we believe that the exception which allows carriers to call consumers with whom they necessarily have an established business relationship renders commenters'

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[330] AT&T Wireless Reply Comments at 26; Verizon Comments at 16; Yellow Pages Comments at 6.

[331] Concerned Telephone Companies Comments at 3.

arguments moot, as carriers necessarily have an established business relationship with any customer from whom they solicit CPNI approval.

VI. ESTABLISHED BUSINESS RELATIONSHIP

A. Background

109. The TCPA provides that the term "telephone solicitation" does not include a call or message to any person with whom the caller has an established business relationship (or EBR).[332] The Commission determined during its initial TCPA rulemaking that, based on the record and legislative history, the TCPA also permits an "established business relationship" exemption from the restrictions on artificial or prerecorded message calls to residences.[333] In the *2002 Notice*, we sought comment on the exemption generally, and more specifically, on the definition of "established business relationship," and whether any circumstances have developed that would justify revisiting these conclusions.[334] The current rules define the term "established business relationship" to mean:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[335]

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[332] 47 U.S.C. § 227(a)(3)(B).

[333] *1992 TCPA Order*, 7 FCC Rcd at 8770, para. 34; *see also* 47 C.F.R. § 64.1200(c)(3).

[334] *2002 Notice*, 17 FCC Rcd at 17480, para. 34.

[335] 47 C.F.R. § 64.1200(f)(4).

110. Industry commenters overwhelmingly support retaining the exemption for calls to customers with whom companies have an established business relationship,[336] and many urge the Commission not to narrow the scope of the exemption.[337] Many industry members are also opposed to any time limitation on the exemption,[338] or any modification of the rules that would interfere with a company's ability to market different services and products.[339] Most consumer groups and state organizations support the exemption, provided the scope of the definition is narrowed.[340] A few

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[336] *See, e.g.*, MPA Comments at 5, 13; MBNA Comments at 7; NAII Comments at 3; SBC Comments at 10; Nextel Comments at 11-13.

[337] *See, e.g.*, ATA Comments at 101-105; NADA Comments at 2.

[338] *See, e.g.*, SBC Comments at 12-13; Intuit Comments at 6; DMA Comments at 20-21; ATA Comments at 105. *But see, e.g.*, ERA Comments at 11 (definition should cover 24 month period prior to call); AT&T Wireless Reply Comments at 18-19 (favoring the FTC's 18-month duration on the established business relationship); Scholastic Comments at 8 (3 years following payment for goods and 6 months following an inquiry); MidFirst Bank Comments at 2-3 (suggesting the existing business relationship be terminated no earlier than a period of 12 months following the last purchase and no earlier than 60 days following the closure of all accounts with a company).

[339] *See, e.g.*, HFS Comments at 6; WorldCom Comments at 14-16; Comcast Comments at 5-7; American Express Comments at 3-4.

[340] *See, e.g.*, NASUCA Comments at 17; John A. Shaw Comments at 4; TOPUC Comments at 5; NYSCPB Comments at 7-8 (should not extend to related business entities); Michael C. Worsham Comments at 10 (should delete "inquiry, application" from definition, as they do not constitute permission to receive prerecorded messages); PUC of Ohio Comments at 15 (should be limited to contact about changes or updates to current product or service); NYSCPB—Other Than DNC List Comments at 7-8, 14-17 (should not extend to related business entities or include a mere inquiry); NCL Comments at 5 (explaining that under the current definition of established business relationship, consumers have to remember the name of every company with whom they have ever had any contact in order to determine which can call legally and which cannot).

consumers advocated eliminating the exemption for prerecorded messages.[341] Some consumer advocates disagreed with the assumption that consumers want to hear from companies with whom they have an existing relationship. One commenter stated that because a consumer might have established a relationship with a company does not necessarily mean that he or she wishes to receive telemarketing calls from that company.[342] Many consumers' groups argued that the relationship should be ongoing,[343] should require a completed transaction, such as a purchase or payment,[344] and should be limited in duration.[345] Of commenters who advocated a specific time limit on the EBR, there was less consensus about how long the relationship should last following a transaction between the seller and consumer.[346]

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[341] Thomas M. Pechnik Comments at 3 (no authority in section 227 for an EBR exemption for artificial or prerecorded message calls); Wayne G. Strang Comments at 12 (should revoke EBR exemption for prerecorded messages).

[342] *See* AARP Comments at 6; *see also* NCL Comments at 5 (urging the Commission to require telemarketers to disclose to their customers that they plan to make telemarketing calls and to provide the opportunity for them to opt-out).

[343] *See, e.g.*, AARP Comments at 5; NASUCA Comments at 17-18.

[344] AARP Comments at 5.

[345] AARP Comments at 5.

[346] Some suggest 24 months (MPA Comments at 12-13 and NASUCA Comments at 17); others advocate a 36-month period (Scholastic Comments at 8 and Bank of America Comments at 4); some commenters maintain that a 12-month period would be sufficient (Sprint Comments at 18); other commenters advocated a definition comparable to the FTC's (DIRECTV Further Comments at 2; NTCA Further Comments at 2-3). *See also* TOPUC Comments at 6 (stating that Commission rules should require that the relationship be ongoing. To qualify as "ongoing," the customers must have completed a purchase or transaction with a specific company within 24 months prior to the call).

111. The FTC decided to provide an exemption for "established business relationships" from the national "do-not-call" registry, as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. The FTC's amended Rule limits the "established business relationship" exemption to relationships formed by the consumer's purchase, rental or lease of goods or services from, or financial transaction with, the seller within eighteen (18) months of the telephone call or, in the case of inquiries or applications, to three (3) months from the inquiry or application.[347] The FTC explained that this time frame is consistent with most state laws that include a time limit,[348] and is more in keeping with consumer expectations than an open-ended exemption.[349] The FTC also determined that affiliates will fall within the exemption only if the consumer would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate.[350]

B. Discussion

112. We conclude that, based on the record, an established business relationship exemption is necessary to allow companies to communicate with their existing customers.[351]

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[347] *FTC Order*, 68 Fed Reg. at 4634; 16 C.F.R. § 310.2(n).

[348] *FTC Order*, 68 Fed. Reg. at 4634.

[349] *FTC Order*, 68 Fed Reg. at 4592.

[350] *FTC Order*, 68 Fed. Reg. at 4593-94.

[351] The "established business relationship" permits telemarketers to call consumers registered on the national do-not-call list and to deliver prerecorded messages to consumers. The "established business relationship," however, is not an exception to the company-specific do-not-call rules. Companies that call their EBR customers must maintain company-specific do-not-call lists and record any do-not-call requests as required by amended 47 C.F.R. § 64.1200(d). *See infra* discussion in para. 124. The Commission has also reversed its prior conclusion that an "established business relationship" provides the necessary permission to

Companies maintain that the exemption allows them to make new offers to existing customers, such as mortgage refinancing, insurance updates, and subscription renewals.[352] They suggest that customers benefit from calls that inform them in a timely manner of new products, services and pricing plans. American Express contends that its financial advisors have a fiduciary duty to their customers, requiring them to contact customers with time-sensitive information.[353] We are persuaded that eliminating this EBR exemption would possibly interfere with these types of business relationships. Moreover, the exemption focuses on the relationship between the sender of the message and the consumer, rather than on the content of the message. It appears that consumers have come to expect calls from companies with whom they have such a relationship, and that, under certain circumstances, they may be willing to accept these calls.[354] Finally, we believe that while consumers may find prerecorded voice messages intrusive, such messages do not necessarily impose the same costs on the recipients as, for example, unsolicited facsimile messages.[355] Therefore, we retain the exemption for established business relationship calls from the ban on prerecorded messages. Telemarketers that claim their prerecorded messages are delivered pursuant to an established business relationship must be prepared to provide clear and convincing evidence of the existence of such a relationship.

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delive[illegible]solicited facsimile advertisements. *See infra* discussion in para. 188-191.

[352] *See, e.g.*, ATA Comments at 105; Verizon Comments at 13-14.

[353] American Express Comments at 4.

[354] *See, e.g.*, Bank of America Comments at 3; ATA Comments at 101.

[355] *See infra* discussion on unsolicited facsimile messages, paras. 185-193.

1. Definition of Established Business Relationship

113. We conclude that the Commission's current definition of "established business relationship" should be revised. We are convinced that consumers are confused and even frustrated more often when they receive calls from companies they have not contacted or done business with for many years. The legislative history suggests that it was Congress's view that the relationship giving a company the right to call becomes more tenuous over time.[356] In addition, we believe that this is an area where consistency between the FCC rules and FTC rules is critical for both consumers and telemarketers. We conclude that, based on the range of suggested time periods that would meet the needs of industry, along with consumers' reasonable expectations of who may call them and when, eighteen (18) months strikes an appropriate balance between industry practices and consumers' privacy interests. Therefore, the Commission has modified the definition of established business relationship to mean:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18)

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[356] *See* H.R. REP. NO. 102-317 at 14 (1991) ("In the Committee's view, an 'established business relationship' . . . could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . The Committee recognized this relationship so as not to foreclose the capacity of businesses to place calls that build upon, follow up, or renew, within a reasonable period of time, what had once been [an] 'existing customer relationship.'") The House Report also states that ". . . the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call. Consequently, the test shall consist of a determination of whether the new solicitation occurs within a reasonable period of time and the new product or service being promoted is related substantially to the prior relationship." *Id.* at 14-15.

> months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.[357]

The 18-month time period runs from the date of the last payment or transaction with the company, making it more likely that a consumer would expect a call from a company with which they have recently conducted business. The amended definition permits the relationship, once begun, to exist for eighteen (18) months in the case of purchases or transactions and three (3) months in the case of inquiries or applications, unless the consumer or the company "terminates" it. We emphasize here that the termination of an established business relationship is significant only in the context of solicitation calls.[358] Therefore, consistent with the language in the definition, a company's prior relationship with a consumer entitles the company to call that consumer for eighteen (18) months from the date of the last payment or financial transaction, even if the company does not currently provide service to that customer.[359] For example, a consumer who once had telephone service with a particular carrier or a subscription with a particular newspaper could expect to receive a call from those entities in an effort to "winback" or "renew" that consumer's business within eighteen (18) months. In the context of telemarketing calls, a consumer's "prior or existing relationship" continues for eighteen (18)

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[357] *See* amended 47 C.F.R. § 64.1200(f)(3).

[358] We also note that the act of "terminating" an established business relationship will not hinder or thwart creditors' attempts to reach debtors by telephone, to the extent that debt collection calls constitute neither telephone solicitations nor include unsolicited advertisements. *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12400, para. 17.

[359] *See* amended 47 C.F.R. § 64.1200(f)(3).

months (3 months in the case of inquiries and applications) or until the customer asks to be placed on that company's do-not-call list.[360]

114. *Inquiries*. The Commission asked whether we should clarify the type of consumer *inquiry* that would create an "established business relationship" for purposes of the exemption. Some consumers and consumer groups maintain that a consumer who merely inquires about a product should not be subjected to subsequent telemarketing calls.[361] Industry commenters, on the other hand, believe that companies should be permitted to call consumers who have made inquiries about their products and services, and that consumers have come to expect such calls.[362] The legislative history suggests that Congress contemplated that an inquiry by a consumer could be the basis of an established business relationship,[363] but that such an inquiry should occur within a reasonable period of time.[364] While we do not believe any communication would amount to an established business relationship for purposes of telemarketing calls, we do not think the definition should be narrowed to only include

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[360] *See infra* discussion on the interplay between the established business relationship and a do-not-call request, para. 124.

[361] NASUCA Comments at 17; TOPUC Comments at 5-6; NCL Comments at 5 (EBR should be narrowed to require a consumer to actually set up an account with a company for the purpose of making recurring or repeated purchases); Michael C. Worsham Comments at 10; Stewart Abramson-December 9, 2002 Comments at 4-5; NYSCPB-Other Than DNC List Comments at 15.

[362] Verizon Comments at 15; FSR Comments at 3-4.

[363] *See* H.R. REP. NO. 102-317 at 14-15 (1991) (noting that if an investor had written to a mutual fund or responded to an ad requesting additional information, the fund's manager could make follow-up calls. The Report also explains that a loan officer or financial consultant may call a telephone subscriber who had requested a loan.).

[364] H.R. REP. NO. 102-317 at 14, 15 (1991).

situations where a purchase or transaction is completed.[365] The nature of any inquiry must, however, be such to create an expectation on the part of the consumer that a particular company will call them. As confirmed by several industry commenters, an inquiry regarding a business's hours or location would not establish the necessary relationship as defined in Commission rules.[366] By making an inquiry or submitting an application regarding a company's products or services, a consumer might reasonably expect a prompt follow-up telephone call regarding the initial inquiry or application, not one after an extended period of time. Consistent with the FTC's conclusion, the Commission believes three months should be a reasonable time in which to respond to a consumer's inquiry or application.[367] Thus, we amend the definition of "established business relationship" to permit telemarketing calls within three (3) months of an inquiry or application regarding a product or service offered by the company.

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[365] *See, e.g.*, TOPUC Comments at 5-6, 11 ("there is no reason for a customer who merely inquires about a product or service, or answers a survey, to be subject to future telemarketing calls"); NCL Comments at 5 (definition should be narrowed to include situations in which the consumer has set up an account with a company for purposes of making recurring or repeated purchases).

[366] Verizon Comments at 15; ATA Comments at 104; ABA Comments at 5.

[367] Most commenters who suggested a time limit on the EBR did not specify that it would apply to inquiries. *But see* Scholastic Comments at 8 (for requests of information, the reasonable amount of time should be at least 6 months); DIRECTV Reply Comments at 5 (FCC should adopt the same timeframes adopted by the FTC—18 months for a purchase and 3 months for an inquiry); Intuit Reply Comments at 7 (3-month rule is not practical from the perspective of an online service provider and software company; customers may be interested in upgrading software or in new products and services several years after the initial purchase).

115. We emphasize here that the definition of "established business relationship" requires a voluntary two-way communication between a person or entity and a residential subscriber regarding a purchase or transaction made within eighteen (18) months of the date of the telemarketing call or regarding an inquiry or application within three (3) months of the date of the call. Any seller or telemarketer using the EBR as the basis for a telemarketing call must be able to demonstrate, with clear and convincing evidence, that they have an EBR with the called party.

116. *Different Products and Services*. The Commission also invited comment on whether to consider modifying the definition of "established business relationship" so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product.[368] Industry commenters believe an EBR with a consumer should not be restricted by product or service, but rather, should permit them to offer the full range of their services and products.[369] Consumer advocates who commented on the issue maintain that a company that has a relationship based on one service or product should not be allowed to use that relationship to market a different service or product.[370] The

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[368] *2002 Notice*, 17 FCC Rcd at 17472, para. 20.

[369] NCTA Comments at 2-5 ("[I]t is precisely because cable operators now compete with a range of other wireline and wireless entities in providing packages of *different* services and products that it is more important than ever—to cable operators *and* their customers—that operators be able to keep their customers informed of the full range of offerings and promotions available to them."); Comcast Comments at 7-8; Cox Comments at 6-8; Yellow Pages Comments at 8; American Express Comments at 3; DMA Comments at 28.

[370] John A. Shaw Comments at 4; PUC of Ohio Comments at 15 (should limit the contact about changes or updates to the current product or service. For example, a lawn care service cannot call to offer vinyl siding); Joe Shields Further Comments at 3 (any product or service

Commission agrees with the majority of industry commenters that the EBR should not be limited by product or service. In today's market, many companies offer a wide variety of services and products. Restricting the EBR by product or service could interfere with companies' abilities to market them efficiently. Many telecommunications and cable companies, for example, market products and services in packages.[371] As long as the company identifies itself adequately,[372] a consumer should not be surprised to receive a telemarketing call from that company, regardless of the product being offered. If the consumer does not want any further calls from that company, he or she may request placement on its do-not-call list.

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offered through telemarketing must be substantially related to the product that created the relationship).

[371] *See* WorldCom Comments at 9 (describing its "Neighborhood" product, which combines a special feature package and unlimited local and long distance calling for one price); Cablevision Reply Comments at 3 (noting that in addition to telephone and telecom products, the company owns an array of entertainment and retail venues. It also faces strong competition from other providers of video programming, and needs to be able to let customers for one line of service know about other services).

[372] As required by the amended rules we adopt today, "[a] person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted." *See* 47 C.F.R. § 64.1200(d)(4). The amended rules also require that all artificial or prerecorded telephone messages shall, "[a]t the beginning of the message, state clearly the identify of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and [d]uring or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) of such business, other entity, or individual. . ." *See* 47 C.F.R. § 64.1200(b).

117. *Affiliated Entities*. In the *1992 TCPA Order*, the Commission found that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries.[373] Consumer advocates maintain that the EBR exemption should not automatically extend to affiliates of the company with whom a consumer has a business relationship.[374] Industry members argue that it should apply to affiliates that provide reasonably-related products or services.[375] The Commission finds that, consistent with the FTC's amended Rule, affiliates fall within the established business relationship exemption only if the consumer would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate.[376] This definition offers flexibility to companies whose subsidiaries or affiliates also make telephone solicitations, but it is based on consumers' reasonable expectations of which companies will call them.[377] As

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[373] *See 1992 TCPA Order*, 7 FCC Rcd at 8770-71, para. 34.

[374] NCL Comments at 5-6; NYSCPB-Other Than DNC List Comments at 7.

[375] *See, e.g.*, SBC Comments at 11 (This is consistent with sec. 272(g), which allows Bell Operating Companies to jointly market services of their long distance affiliates); Visa Comments at 6 (should also apply to co-brand and affinity partners); FSR Comments at 4 (Commission should make clear that any member of a corporate family, including subsidiaries and affiliates, should be permitted to call as long as customer has EBR with any member).

[376] Given the numerous types of business relationships, the Commission believes it appropriate to treat the issue of a consumer's "reasonable expectations" in any complaint on a case-by-case basis. *See also* H.R. REP. NO. 102-317 at 15 (noting that contact by an affiliate of the company with whom a consumer has an established business relationship may be permissible if the solicitation by the affiliate related to a transaction in progress with the consumer or was substantially related to the product or service forming the basis of the business relationship.).

[377] *See, e.g.*, American Express Comments at 4.

the ATA and other commenters explain, consumers often welcome calls from businesses they know. A call from a company with which a consumer has not formed a business relationship directly, or does not recognize by name, would likely be a surprise and possibly an annoyance. This determination is also consistent with current Commission rules on the applicability of do-not-call requests made to affiliated persons or entities. Under those rules, a residential subscriber's do-not-call request will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product advertised.[378]

118. *Other Issues*. The Commission clarifies that the established business relationship exemption does not permit companies to make calls based on referrals from existing customers and clients,[379] as the person referred presumably does not have the required business relationship with the company that received the referral. An EBR is similarly not formed when a wireless subscriber happens to use another carrier's services through roaming.[380] In such a situation, the consumer has not made the necessary purchase or inquiry that would constitute an EBR or provided prior express consent to receive telemarketing calls from that company. We recognize that companies often hire third party telemarketers to market their services and products. In general, those telemarketers may rely on the seller's EBR to call an individual consumer to market the seller's services and products.[381] However, we

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[378] *See* 47 C.F.R. § 64.1200(e)(2)(v).

[379] *See* New Jersey Ratepayer Further Reply Comments at 3 (providing an exemption for referrals by existing customers would provide an open door and the element of consent would still be missing). *But see* NAIFA Comments at 3.

[380] *See* AT&T Wireless Comments at 25 (arguing that an established business relationship is formed in such a situation).

[381] *See* Verizon Comments at 14-15.

disagree with Nextel that a consumer's EBR with a third party telemarketer, including a retail store or independent dealer, extends to a seller simply because the seller has a contractual relationship with that telemarketer. The seller would only be entitled to call a consumer under the EBR exemption based on its own EBR with a consumer.[382] We also disagree with WorldCom that the EBR should extend to marketing partners for purposes of telemarketing joint offers, to the extent the "partner" companies have no EBR with the consumer.[383]

2. Telecommunications Common Carriers

119. In the *2002 Notice*, we asked what effect the established business relationship exemption might have on the telecommunications industry, if a national do-not-call list is established. According to WorldCom, telephone solicitations are the primary mechanism for, and the means by which consumers are accustomed to, purchasing competitive telecommunications services.[384] WorldCom argues that with the advent of competition in the formerly monopolized local telephone markets, and the entry of the Regional Bell Operating Companies into the long distance market, carriers need to be able to market effectively their new services.[385] WorldCom argues that a national do-not-call list that exempts calls to persons with whom a company has established

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[382] *See* Nextel Reply Comments at 15-17. However, if a consumer purchases a seller's products at a retail store or from an independent dealer, such purchase would establish a business relationship with the seller, entitling the seller to call that consumer under the EBR exemption.

[383] *See* Notice of *Ex Parte Presentation* from WorldCom to FCC at 8, filed June 16, 2003.

[384] WorldCom Comments at 7.

[385] WorldCom Comments at 9 ("telemarketing is the most cost-effective way to introduce new products and services to the public, especially local and long distance telecommunications services that customers customize for their specific needs" (footnote omitted)).

business relationships will favor incumbent providers.[386] According to WorldCom, incumbent local exchange carriers maintain most of the local customer base, and therefore would be able to telemarket new services to all those customers, regardless of whether they were on the national do-not-call registry, because of the established business relationship exemption. New competitors, on the other hand, would be restricted from calling those same consumers.

120. One approach would be to narrow the "established business relationship" for telecommunications carriers, so that a carrier doing business with customers based on one type of service may not call those customers registered with the national do-not-call list to advertise a different service.[387] We find, however, that the record does not support such an approach in the context of telemarketing calls. Along with the majority of industry commenters in this proceeding, WorldCom maintains that companies "must have flexibility in communicating with their customers not only about their current services, but also to discuss available alternative

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[386] WorldCom Comments at 13; *see also* ATA Reply Comments at 30-32; Winstar Further Comments at 3-4 (maintaining that the FCC should either exempt telecommunications service providers from the do-not-call rules or implement rules that prevent incumbents from using the EBR to preserve their monopoly); CompTel Further Reply Comments at 2 (should follow WorldCom's suggestion and determine that all consumers have an EBR with all providers of local service). *But see* Wayne G. Strang Reply Comments at 16 (suggesting that WorldCom's arguments are exaggerated as even those entities that have an established business relationship with a subscriber may not take advantage of the exemption once the subscriber makes a do-not-call request).

[387] *See 2002 Notice*, 17 FCC Rcd at 17472, para. 20; *see also* Shaw Further Reply Comments at 13 (if there is any competition problem, the EBR for ILECS should not allow them to sell the customer additional services or products).

services or products. . . ."[388] Limiting a common carrier's "established business relationship" by product or service might harm competitors' efforts to market new goods or services to existing customers, and would not be in the public interest.

121. WorldCom proposes instead that the Commission revise the definition of established business relationship so that all providers of a telecommunications service—incumbents and new entrants alike—are deemed to have an established business relationship with all consumers.[389] Alternatively, WorldCom suggests that the definition of an established business relationship be revised to exclude a company whose relationship with a consumer is based solely on a service for which the company has been a dominant or monopoly provider of the service, until such time as competitors for that service have sufficiently penetrated the market.[390]

122. Although we take seriously WorldCom's concerns about the potential effects of a national do-not-call list on competition in the telecommunications marketplace, we decline to expand the definition of "established business relationship" so that common carriers are deemed to have relationships with all consumers for purposes of making telemarketing calls. Broadening the scope of the established business relationship in such a way would be inconsistent with Congress's mandate "to protect residential telephone

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[388] WorldCom Comments at 15. *See also* WorldCom Comments at 15-16 (arguing that limiting calls to those related to the customer's current service does not make sense in a market where products are increasingly integrated).

[389] WorldCom Reply Comments at 11. *But see* Verizon Further Reply Comments at 2-3 (it would be at odds with the plain meaning of EBR to adopt WorldCom's suggestion that all consumers would have an EBR with WorldCom).

[390] WorldCom Reply Comments at 11.

subscribers' privacy rights to avoid receiving telephone solicitations to which they object."[391] To permit common carriers to call consumers with whom they have no existing relationships and who have expressed a desire not to be called by registering with the national do-not-call list, would likely confuse consumers and interfere with their ability to manage and monitor the telemarketing calls they receive.[392]

123. We further note that with the establishment of a national do-not-call registry, carriers will still be permitted to contact competitors' customers who have not placed their numbers on the national list. In addition, carriers will be able to call their prior and existing customers for 18 months to market new products and services, such as long distance, local, or DSL services, as long as those customers have not placed themselves on that carrier's company-specific do-not-call list.[393] For the remaining consumers with whom common carriers have no established business relationship and who are registered with the do-not-call list, carriers may market to them using different advertising methods, such as direct mail. Therefore, we find that treating common carriers like other entities that use the telephone to advertise, best furthers the goals of the TCPA to protect consumer privacy interests and to avoid interfering with existing business relationships.

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[391] *See* 47 U.S.C. § 227(c)(1).

[392] We note that of the TCPA-related complaints filed by consumers with the Commission, a substantial number have been against common carriers. *See* Caroline E. Mayer, "Do Not Call' List Operator AT&T Leads in Complaints," Washingtonpost.com (April 23, 2003) <http://washingtonpost.com/wp-dyn/articles/A17683-2003Apr22.html> (describing the number of complaints filed against AT&T and other common carriers for do-not-call violations); *see also* ATA Comments, Appendix 16.

[393] *See supra* para. 113 for a discussion regarding termination of the established business relationship for purposes of telemarketing calls.

3. Interplay Between Established Business Relationship and Do-Not-Call Request

124. In the *2002 Notice*, we sought comment on the effect of a do-not-call request on an established business relationship.[394] We noted the legislative history on this issue, which suggests that despite an established business relationship, a company that has been asked by a consumer not to call again, must honor that request and avoid further calls to that consumer.[395] Consumer advocates who discussed the interplay between the established business relationship and a do-not-call request maintained that a do-not-call request should "trump" an established business relationship,[396] and that consumers should not be required to terminate business relationships in order to stop unwanted telemarketing calls.[397] The majority of industry commenters also supported the notion that companies should honor requests from individual consumers not to be called, regardless of whether there is a

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[394] *2002 Notice*, 17 FCC Rcd at 17480-81, para. 35.

[395] *See* H.R. REP. NO. 102-317 at 15-16 (1991) ("If a subscriber asks a company with whom it has an established relationship not to call again, that company has an obligation to honor the request and avoid further contacts. Despite the fact that objecting subscribers can be called based on an 'established business relationship,' it is the strongly held view of the Committee that once a subscriber objects to a business that calls based on an established relationship, such business must honor this second objection and implement procedures not to call that twice-objecting subscriber again.").

[396] *See, e.g.*, Thomas M. Pechnik Comments at 3; Joe W. McDaniel-Fifth December 5, 2002 Comments; City of Chicago Comments at 11-12; Philip J. Charvat Comments at 8; Mark A. Hiner Comments; Barbara Crouse Comments (receives calls from a newspaper because she is a subscriber, even when she asks to be placed on a do-not-call list); Wayne G. Strang Comments at 13; TOPUC Comments at 6.

[397] Owen O'Neill Comments at 2; City of New Orleans Comments at 10.

business relationship.[398] As discussed earlier, companies will be permitted to call consumers with whom they have an established business relationship for a period of 18 months from the last payment or transaction, even when those consumers are registered on the national do-not-call list, as long as a consumer has not asked to be placed on the company's do-not-call list. Once the consumer asks to be placed on the company-specific do-not-call list, the company may not call the consumer again regardless of whether the consumer continues to do business with the company. This will apply to all services and products offered by that company.[399] If the consumer continues to do business with the telemarketer after asking not to be called (by, for example, continuing to hold a credit card, subscribing to a newspaper, or making a subsequent purchase), the consumer cannot be deemed to have waived his or her company-specific do-not-call request.[400] As described above, we amend the company-specific do-not-call rules to apply to "any call for telemarketing purposes" to make clear that a company must cease making telemarketing calls to any customer who has made a do-not-call request, regardless of whether they have

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[398] *See, e.g.*, DialAmerica Comments at 14; AT&T Wireless Comments at 26-27; Verizon Comments at 15; HFS Comments at 9; NCTA Comments at 5. *But see* Bank of America Comments at 6 (a do-not-call request should not terminate the relationship, and businesses should be able to continue calling those customers).

[399] *See, e.g.*, Philip J. Charvat Comments at 8 (If product exceptions to do-not-call requests were allowed, the TCPA's effectiveness would be eviscerated. "A 'credit card' offer declined by a consumer with a [do-not-call] demand, will be followed by a 'shopping convenience card' offer from the same entity"); Stewart Abramson-December 9, 2002 Comments at 1 (a do-not-call request should apply to the business generally, not just by product or service. Otherwise, it would be very time-consuming for the consumer).

[400] In some instances, however, a consumer may grant explicit consent to be called during the course of a subsequent purchase or transaction.

an EBR with that customer.[401] We also adopt a provision stating that a consumer's do-not-call request terminates the EBR for purposes of telemarketing calls even if the consumer continues to do business with the seller.[402]

VII. TAX-EXEMPT NONPROFIT ORGANIZATION EXEMPTION

A. Background

The term "telephone solicitation," as defined in the TCPA, does not include a call or message "by a tax-exempt nonprofit organization."[403] The Commission concluded, as part of its *1995 Reconsideration Order*, that calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call.[404] Therefore, calls made by independent telemarketers on behalf of tax-exempt nonprofits also are not subject to the rules governing telephone solicitations.[405]

126. Over the years, the Commission has received inquiries about calls made jointly by nonprofit and for-profit organizations. In the *2002 Notice*, we described a scenario in which a tax-exempt nonprofit organization calls consumers to sell another company's magazines and receives a portion of the proceeds. We then asked whether such calls should be

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[401] *See* amended rule at 47 C.F.R. § 64.1200(d). *See also supra* para. 96.

[402] *See* amended rule at 47 C.F.R. § 64.1200(f)(3)(i).

[403] 47 U.S.C. § 227(a)(3). In its initial rulemaking in 1992, the Commission concluded that, in the same vein, calls by tax-exempt nonprofit organizations also should be exempt from the prohibition on prerecorded messages to residences as non-commercial calls. *See 1992 TCPA Order*, 7 FCC Rcd at 8773-74, para. 40; *see also* 47 U.S.C. § 227(a)(3)(C) and 47 C.F.R. § 64.1200(c)(4).

[404] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

[405] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

exempt from the restrictions on telephone solicitations and prerecorded messages as calls made by a tax-exempt nonprofit organization.[406]

127. Tax-exempt nonprofit organizations explained that they rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns. Therefore, they support the continued exemption for professional fundraisers that call on behalf of nonprofit organizations.[407] Many commenters, while supportive of the exemption for calls by nonprofits, were concerned that it frequently has been used to veil what is in reality a commercial venture.[408] Some commenters emphasized that "the TCPA nonprofit exemption should not function as an artifice for an inherently commercial enterprise."[409] NAAG, for example, maintained that calls that serve to benefit for-profit companies (in whole or in part) are not calls by or on behalf of nonprofits and should remain subject to the TCPA's restrictions.[410] The Association of Fundraising Professionals

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[406] *2002 Notice*, 17 FCC Rcd at 17479, para. 33.

[407] NPCC Comments at 12-13; March of Dimes Comments at 2; Special Olympics-Hawaii Comments; NPCC Comments at 4 ("An estimated 60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations." (cites omitted)).

[408] NPCC Comments at 10; Donald R. Davis Comments; Private Citizen Comments at 4; Gregory S. Reichenbach Comments.

[409] NPCC Comments at 10. *See also* Private Citizen Comments at 4; Gregory S. Reichenbach Comments.

[410] NAAG Comments at 39 (describing an example of a for-profit sending prerecorded messages "to residential phone numbers, promising to reduce interest rates and save consumers money repaying their credit card debt. The prerecorded message did not disclose how the savings would be achieved and did not identify any nonprofit organization. If a caller responded to the 1-800 number on the message, the caller reached the for-profit call center. In the sales pitch that followed, the telemarketer described credit counseling services offered by a nonprofit organization.

similarly asserted that this type of nonprofit/for-profit initiative does not represent a "pure" charitable appeal; that the primary purpose of such a transaction is receipt of a product or service by the consumer, not the charitable transfer of funds.[411] One commenter suggested that the test for whether a call is made on behalf of a nonprofit organization should be whether payment is made to the tax-exempt nonprofit organization.[412] DialAmerica, on the other hand, urged the Commission to confirm that the exemption also applies when for-profits call, conduct a commercial transaction, and donate a percentage of the proceeds to nonprofit charitable organizations.[413]

B. Discussion

128. We reaffirm the determination that calls made by a for-profit telemarketer hired to solicit the purchase of goods or services or donations on behalf of a tax-exempt nonprofit organization are exempted from the rules on telephone solicitation.[414] In crafting the TCPA, Congress sought primarily to protect telephone subscribers from unrestricted

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However, the telemarketer solicited "enrollment fees" (between $199-499), payable entirely to the for-profit company. . . Consumers interested in nonprofit credit counseling would be referred to a nonprofit credit counselor, but only after they paid hundreds of dollars to the for-profit marketing company."); *see also* Wayne G. Strang Comments at 7; City of New Orleans Comments at 9-10; Donald R. Davis Comments.

[411] AFP Comments at 3.

[412] Reese Comments at 10.

[413] DialAmerica Comments at 13-14. *See also* DialAmerica Reply Comments at 13 (DialAmerica's Sponsor Magazine Program donates 12.5% of the proceeds to the charity.).

[414] We again reiterate that calls that do not fall within the definition of "telephone solicitation" as defined in section 227(a)(3) will not be precluded by the national do-not-call list. These may include calls regarding surveys, market research, and calls involving political and religious discourse. *See supra* para. 37.

commercial telemarketing activities, finding that most unwanted telephone solicitations are commercial in nature.[415] In light of the record before us, the Commission believes that there has been no change in circumstances that warrant distinguishing those calls made by a professional telemarketer on behalf of a tax-exempt nonprofit organization from those made by the tax-exempt nonprofit itself. The Commission recognizes that charitable and other nonprofit entities with limited expertise, resources and infrastructure, might find it advantageous to contract out its fundraising efforts.[416] Consistent with section 227, a tax-exempt nonprofit organization that conducts its own fundraising campaign or hires a professional fundraiser to do it, will not be subject to the restrictions on telephone solicitations.[417] If, however, a for-profit organization is delivering its own commercial message as part of a telemarketing campaign (*i.e.*, encouraging the purchase or rental of, or investment in, property, goods, or services),[418] even if accompanied by a donation to a charitable organization or referral to a tax-exempt nonprofit organization,[419] that call is not *by or on behalf of a tax-exempt nonprofit organization*.[420] Such calls,

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[415] *See* H.R. REP. NO. 102-317 at 16-17 (1991).

[416] *See* NPCC Comments at 13 ("Nonprofit and charitable organizations rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns and disseminate their message. . . . *Such trained professionals offer significant resources, expertise and operational efficiencies that cannot be duplicated by nonprofit and charitable organizations*." (emphasis added; cites omitted))

[417] These restrictions are found in amended 47 C.F.R. §§ 64.1200(c) and (d).

[418] *See* 47 U.S.C. § 227(a)(3) and amended 47 C.F.R. § 64.1200(f)(9).

[419] Similarly, an affiliate of a tax-exempt nonprofit organization that is itself not a tax-exempt nonprofit is not exempt from the TCPA rules when it makes telephone solicitations.

[420] *See* NPCC Comments at 10; AFP Comments at 3.

whether made by a live telemarketer or using a prerecorded message, would not be entitled to exempt treatment under the TCPA. We emphasize here, as we did in the *2002 Notice*, that the statute and our rules clearly apply already to messages that are predominantly commercial in nature, and that we will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself by simply inserting purportedly "non-commercial" content into that message. A call to sell debt consolidation services, for example, is a commercial call regardless of whether the consumer is also referred to a tax-exempt nonprofit organization for counseling services.[421] Similarly, a seller that calls to advertise a product and states that a portion of the proceeds will go to a charitable cause or to help find missing children must still comply with the TCPA rules on commercial calls.

VIII. AUTOMATED TELEPHONE DIALING EQUIPMENT

A. Background

129. The TCPA and Commission's rules prohibit calls using an automatic telephone dialing system (or "autodialer") to emergency telephone lines, to the telephone line of a guest room of a health care facility, to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.[422] Section 227 defines automatic telephone dialing system as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

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[421] Unlike debt collection calls, a consumer may "terminate" an established business relationship with a company offering debt consolidation services by requesting placement on a company-specific do-not-call list. *See supra* note 358.

[422] 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

(B) to dial such numbers."[423] In the *2002 Notice*, the Commission explained that more sophisticated dialing systems, such as predictive dialers and answering machine detection software, are now widely used by telemarketers to increase productivity. We invited comment on these and other technologies and asked whether they fall within the restrictions on "automatic telephone dialing systems."[424]

130. Most industry members that commented on the issue of autodialed calls argue that predictive dialers do not fall within the statutory definition of "automatic telephone dialing system," primarily because, they contend, predictive dialers do not dial numbers "randomly or sequentially."[425] Rather, they state that predictive dialers store pre-programmed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers.[426] Most consumers and consumer groups maintain that predictive dialers are autodialers; that to distinguish technologies on the basis of whether they dial randomly or use a database of numbers would create a distinction without a difference.[427] They argue that for the

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[423] 47 U.S.C. § 227(a)(1); *see also*, 47 C.F.R. § 64.1200(f)(1).

[424] *2002 Notice*, 17 FCC Rcd at 17473-74, paras. 23-24.

[425] *See, e.g.*, Mastercard Comments at 6; Verizon Comments at 23; HFS Comments at 7; Discover Comments at 8; CBA Comments at 7-8; Bank of America Comments at 5; ATA Comments at 113-114. *But see* American General Finance Comments at 1 (urging the Commission to clarify the definitions of "automatic telephone dialing system" and "autodialer," which focus on equipment that *has the capacity* to generate random number and sequential dialing patterns, rather than on whether the equipment is actually used in that fashion).

[426] *See, e.g.*, Mastercard Comments at 6; HFS Comments at 7; Verizon Comments at 23; Discover Comments at 8.

[427] *See, e.g.*, EPIC Comments at 12; City of Chicago Comments at 9-11; Stewart Abramson Comments at 1-2; Michael C. Worsham Comments at 6.

recipient of the call, there is no difference whether the number is dialed at random or from a database of numbers.[428] A few commenters contend that even when a database of numbers is used, the numbers can be dialed in sequence.[429] In addition, LCC urges the Commission to clarify that modems used for non-telemarketing purposes are excluded from the definition of "automatic telephone dialing system."[430]

B. Discussion

1. Predictive Dialers

131. *Automated Telephone Dialing Equipment.* The record demonstrates that a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls.[431] The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential

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[428] *See, e.g.*, Thomas M. Pechnik Comments at 4; Stewart Abramson Comments at 2 (FCC should not have to identify specific technologies covered by definition as technologies are always changing). *But see* Wayne G. Strang Comments at 6 (should ask Congress to change the definition to cover all devices capable of automatically dialing calls).

[429] *See* Thomas M. Pechnik Comments at 5; Michael C. Worsham Comments at 5.

[430] *See* LCC Comments at 7. LCC explains that, on behalf of certain clients, it installs terrestrial repeaters across the country, which receive satellite signals and retransmit the signals into areas that the signals would not otherwise reach. The repeaters contain an on-board modem, which may be programmed to call the client's number in the event a malfunction occurs. If the modem is programmed incorrectly, it may dial a number other than the number of the client. *See* LCC Comments at 2-3.

[431] *See, e.g.*, HFS Comments at 7; ATA Comments at 110; ABA Comments at 3.

order, or from a database of numbers.[432] As commenters point out, in most cases, telemarketers program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the call.[433] The principal feature of predictive dialing software is a timing function, not number storage or generation. Household Financial Services states that these machines are not conceptually different from dialing machines without the predictive computer program attached.[434]

132. The TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[435] The statutory definition contemplates autodialing equipment that either stores or produces numbers. It also provides that, in order to be considered an "automatic telephone dialing system," the equipment need only have the "*capacity* to store or produce telephone numbers (emphasis added). . . ." It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.[436] In the past, telemarketers may

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[432] *See* ATA Comments at 113, n. 108; DMA Comments at 21 ("Some dialers are capable of being programmed for sequential or random dialing; some are not.").

[433] Mastercard Comments at 6.

[434] HFS Comments at 7.

[435] 47 U.S.C. § 227(a)(1).

[436] *See* 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies."). *See also Southern Co. v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002) ("While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a

have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective.[437] The basic function of such equipment, however, has not changed—the *capacity* to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.

133. The legislative history also suggests that through the TCPA, Congress was attempting to alleviate a particular problem—an increasing number of automated and prerecorded calls to certain categories of numbers.[438] The TCPA does not ban the use of technologies to dial telephone numbers. It merely prohibits such technologies from dialing emergency numbers, health care facilities, telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call.[439] Such practices were determined to threaten public safety and inappropriately shift marketing costs from sellers to consumers.[440] Coupled

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way to 'give effect, if possible, to every clause and word of a statute'.") (*quoting Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted)).

[437] ATA Comments at 113.

[438] NASUCA Comments at 4-5.

[439] One commenter suggests that databases of emergency and cellular numbers are commercially available which can be used to exclude emergency numbers, health care facilities and wireless numbers from an automated dialer's calling list. *See* ECN Comments at 3. The Commission is not persuaded that any such databases would include all numbers covered by the prohibition at 47 U.S.C. § 227(b)(1)(A), or that such databases are sufficiently accurate. Assuming, though, that predictive dialers can be programmed to avoid calling such numbers, there would be no reason to then exclude the dialing equipment from the TCPA's prohibition.

[440] *See* S. REP. NO. 102-178 at 5 *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-73 (1991) ("The Committee believes that Federal legislation is

with the fact that autodialers can dial thousands of numbers in a short period of time, calls to these specified categories of numbers are particularly troublesome. Therefore, to exclude from these restrictions equipment that use predictive dialing software from the definition of "automated telephone dialing equipment" simply because it relies on a given set of numbers would lead to an unintended result. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages. We believe the purpose of the requirement that equipment have the "capacity to store or produce telephone numbers to be called" is to ensure that the prohibition on autodialed calls not be circumvented.[441] Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of "automatic telephone dialing equipment" and the intent of Congress.[442]

134. *Predictive Dialers as Customer Premises Equipment.* A few commenters maintain that predictive dialers are Customer Premises Equipment (CPE)[443] over which the

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necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.").

[441] *See* 47 U.S.C. § 227(a)(1).

[442] Because the statutory definition does not turn on whether the call is made for marketing purposes, we also conclude that it applies to modems that have the "capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *See* 47 U.S.C. § 227(a)(1).

[443] Customer Premises Equipment is defined in the Communications Act as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." *See* 47 U.S.C. § 153(14).

Communications Act gives the FCC exclusive jurisdiction.[444] The ATA and DMA urge the Commission to assert exclusive authority over CPE and, in the process, preempt state laws governing predictive dialers. They contend that, in the absence of a single national policy on predictive dialer use, telemarketers will be subject to the possibility of conflicting state standards.[445] In the past, CPE was regulated as a common carrier service based on the Commission's jurisdiction and statutory responsibilities over *carrier-provided* equipment.[446] The Commission long ago deregulated CPE, finding that the CPE market was becoming increasingly competitive, and that in order to increase further the options that consumers had in obtaining equipment, it would require common carriers to separate the provision of

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[444] *See* ATA Comments at 120; ATA Further Comments at 11-12; DMA Reply Comments at 17; WorldCom Comments at 41 (asserting that predictive dialers are customer premises equipment).

[445] *See* ATA Comments at 120-122 (noting that the Commission also has authority to forebear from adopting a specific rule governing predictive dialers to promote marketplace flexibility). *See also* DMA Comments at 17 ("Predictive dialers are customer premises equipment ("CPE"), and thus beyond the states' power to regulate pursuant to the Communications Act of 1934 and longstanding Commission rules and orders. These policies apply because predictive dialers are used interchangeably and inseparably for both inter- and intrastate communications, and are not susceptible to a segregated regulatory framework that would govern inter- and intrastate uses separately."); DMA Further Comments at 4.

[446] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 FCC2d 384, Final Decision (1980) *(Computer II)*. In the *Computer II* Order, the Commission explained that " In conferring jurisdiction upon this agency over 'all instrumentalities . . . incidental to . . . transmission,' the intent was '. . . to give the FCC ability to regulate any charge or practice associated with a common carrier service in order to insure that the carrier operated for the public benefit.'" *See Computer II*, 77 FCC2d at 450, para. 170.

CPE from the provision of telecommunications services.[447] As part of its review of CPE regulations, the Commission pointed out that it had never regarded the provision of terminal equipment in isolation as an activity subject to Title II regulation.[448] While the Commission recognized that such equipment is within the FCC's authority over wire and radio communications,[449] it found that the equipment, by itself, is not a "communication" service, and therefore there was no mandate that it be regulated.[450] None of the commenters who argue this point describe a change in circumstances that would warrant reevaluating the Commission's earlier determination and risk disturbing the competitive balance the Commission deemed appropriate in 1980.[451] In addition, it is

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[447] *Computer II*, 77 FCC2d at 442-43, para. 149; *see also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, CC Docket Nos. 96-91 and 98-183, 16 FCC Rcd 7418, 7422, para. 5 (March 30, 2001).

[448] *Computer II*, 77 FCC2d at 451, para. 172. The Commission explained that "[e]quipment manufacturers, distributors, and even regulated carriers routinely offer terminal equipment for sale or lease on an untariffed basis."

[449] *See Computer II*, 77 FCC2d at 451-52, paras. 172-173. ("[S]uch activities are not necessarily beyond the jurisdiction of the Commission to the extent they are encompassed within the definition of wire or radio communications in Section 3(a) of the Act. The definitions of wire and radio communications in Section 3(a) and (b) are far-reaching and include 'all instrumentalities, facilities, apparatus, and services incidental to such transmission.' " Indeed we explicitly find that all terminal equipment used with interstate communications services are within the Act's definition of wire and radio communications. However, the fact that the provision of incidental 'instrumentalities,' etc. is within the subject matter jurisdiction of the Act does not mandate regulation of the 'instrumentalities.' ") (footnotes omitted).

[450] *Computer II*, 77 FCC2d at 451-452, para. 173.

[451] The Commission earlier stated that "[a]ny regulation by tariff or otherwise of terminal equipment must be demonstrated to be reasonably ancillary to the effective performance of the Commission's

not the equipment itself that states are considering regulating; it is the use of such equipment that has caught the attention of some state legislatures.[452] We believe it is preferable at this time to regulate the use of predictive dialers under the TCPA's specific authority to regulate telemarketing practices. Therefore, we decline to preempt state laws governing the use of predictive dialers and abandoned calls or to regulate predictive dialers as CPE.

2. "War Dialing"

135. In the *2002 Notice*, the Commission sought comment on the practice of using autodialers to dial large blocks of telephone numbers in order to identify lines that belong to telephone facsimile machines. Of those commenters who weighed in on "war dialing,"[453] there was unanimous support for a ban on the practice.[454] Commenters explained that ringing a telephone for the purpose of determining whether the number is associated with a fax or voice line is an

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responsibilities under Title II or 'imperative for the achievement of an agency's ultimate purposes.' ") *Computer II*, 77 FCC Rcd at 451-52, para. 173.

[452] *See* Private Citizen Comments at 7 ("California will be implementing a 1% abandonment rate soon."); HFS at 7 ("California adopted legislation requiring a maximum for abandoned calls, but the regulatory body charged with setting the maximum has, to our knowledge, been unable to establish a maximum yet."). Oklahoma bans the use of automatic or predictive dialing devices that abandon more than 5% of calls answered per day per telemarketing campaign. *See* Okla. Stat. tit. 15, §755.1 (2002). Virginia failed to pass legislation proposing to regulate the use of predictive dialers. *See* S.B. 918, 2003 Gen. Assem. (Va. 2003).

[453] In this context, war dialing uses automated equipment to dial telephone numbers, generally sequentially, and software to determine whether each number is associated with a fax line or voice line.

[454] *See* Thomas M. Pechnik Comments at 6; PRC Comments at 4-5; Michael C. Worsham Comments at 5; Carl Paulson Comments; Wayne G. Strang Reply Comments at 21.

invasion of consumers' privacy interests and should be prohibited. Moreover, they asserted there is no free speech issue when the caller has no intention of speaking with the called party.[455] The TCPA prohibits the transmission of unsolicited facsimile advertisements absent the consent of the recipient. The Commission agrees that because the purpose of "war dialing" is to identify those numbers associated with facsimile machines, the practice serves few, if any, legitimate business interests and is an intrusive invasion of consumers' privacy. Therefore, the Commission today adopts a rule that prohibits the practice of using any technology to dial any telephone number for the purpose of determining whether the line is a fax or voice line.[456]

IX. ARTIFICIAL OR PRERECORDED VOICE MESSAGES

A. Background

136. As described above, the TCPA and Commission rules prohibit telephone calls to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is specifically exempted.[457] The TCPA permits the Commission to exempt from this provision calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement.[458] In its 1992 proceeding, the Commission determined to exempt calls that are non-commercial and commercial calls that do not contain an unsolicited advertisement, noting that

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[455] *See, e.g.*, Thomas M. Pechnik Comments at 5; Wayne G. Strang Reply Comments at 21.

[456] *See* amended rule at 47 C.F.R. § 64.1200(a)(7).

[457] 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2).

[458] 47 U.S.C. § 227(b)(2)(B).

messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by section 227.[459] The Commission also concluded that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests, and adopted an exemption for prerecorded messages delivered to consumers with whom a company has an established business relationship.[460] Finally, the Commission concluded that tax-exempt nonprofit organizations should be exempt from the prohibition on prerecorded message calls to residences as non-commercial calls.[461] In the *2002 Notice,* the Commission sought comment on artificial or prerecorded messages containing offers for free goods or services and messages purporting to provide "information only" about products or services. We also invited comment on calls seeking people to help sell or market a business' products. We asked whether such messages should be viewed as advertisements under the rules.

137. The record reveals that the practice of sending prerecorded messages to residential telephone lines is widespread. [462] Consumers are frustrated by such messages,

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[459] *See 1992 NPRM*, 7 FCC Rcd at 2737, para. 11. Among the examples of calls that do not include the transmission of any unsolicited advertisement, the Commission cited calls from a business that wishes to advise its employees of a late opening time due to weather; or calls from a nationwide organization that wishes to remind members of an upcoming meeting or change in schedule; or calls from a catalogue or delivery company to confirm the arrival, shipment, or delivery date of a product to a customer. We reiterate that such calls also would typically be covered by the exemption for an established business relationship. *See* amended 47 C.F.R. § 64.1200(f)(3).

[460] *1992 TCPA Order*, 7 FCC Rcd at 8770-71, para. 34.

[461] *1992 TCPA Order*, 7 FCC Rcd at 8773-74, para. 40.

[462] NAAG Comments at 33 ("The telephone records subpoenaed for one autodialing telemarketer revealed the business was using 47 lines to leave messages that lasted less than 30 seconds. Considering that calls

which often fill up the tapes of their answering machines,[463] fail to identify adequately the company delivering the message, and provide no option for requesting that the company not call again.[464] When consumers attempt to place their numbers on a do-not-call list in response to a pre-recorded message, they often reach busy signals,[465] additional prerecorded messages, or are told that do-not-call requests are not processed at that number.[466] Consumers also indicate that they have been told by telemarketers that "free" offers and informational messages are not subject to the prerecorded message prohibition, as they do not ask the called party to purchase any product or service.[467]

138. The majority of consumers and consumer groups contend that messages offering "free" goods or services or those that claim to provide information-only are designed with the ultimate goal of soliciting consumers to buy products and services and are therefore prohibited without the prior express consent of the called party.[468] These messages, they

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could be placed over at least a 14-hour period, the equipment could leave more than half a million calls per week."); Wayne G. Strang Comments at 5; Mathemaesthetics Comments at 7; Philip J. Charvat Comments at 5.

[463] Michael Sprinker Comments; Dale Carson Comments; Judith Hanes Comments; Jean Armstrong Comments; NACAA Comments at 2-3.

[464] *See, e.g.*, NACAA Comments at 2-3; Tom Burch Comments; James D. Gagnon Comments; Neil J. Nitzberg Comments at 1; John Cox Comments; NYSCPB – Other Than DNC List Comments at 2.

[465] Debra Denson-Royal Oak Comments.

[466] Dennis C. Brown December 6, 2002 Comments at 4; David Purk Comments.

[467] *See, e.g.*, NCL Comments at 5.

[468] NCL Comments at 5; Thomas Pechnik Comments at 8; TOPUC Comments at 4-5; Michael C. Worsham Comments at 9; City of New Orleans Comments at 8; J. Melville Capps Comments at 6-7; NAAG Comments at 37; NYSCPB Comments at 12; S. Abramson Comments at 4; NACAA Comments at 4; Wayne G. Strang Comments at 16; Philip J. Charvat Comments at 7; EPIC Comments at 13.

argue, are intended to generate future sales, and the fact that no sale occurs during the call is irrelevant to their intrusiveness.[469] Industry members provided very few examples of prerecorded messages used to deliver advertisements. Instead, they described the benefits of communicating with existing customers through prerecorded messages. Commenters specifically cautioned the Commission against restricting "dual purpose" calls which, they contend, provide both a convenient customer service and cost effective marketing tool.[470] One company explained that it uses prerecorded messages to notify its customers about delinquent bills or changes in service, and to simultaneously inform them of alternative services and products.[471] Another commenter described messages sent by a mortgage broker alerting homeowners to lower interest rates and offering refinancing options.[472]

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[469] *See, e.g.,* NAAG Comments at 36-37; TOPUC Comments at 5; J. Melville Capps Comments at 6; NYSCPB Comments at 12. *See also* NAAG at 33, n. 108 (describing a prerecorded message received by many state attorneys general offices which invited the called party to call an 800 number to participate in Disney's 100th Anniversary celebration by visiting south Florida for a cost of $99 per person for three days); NAAG at 37 (describing another message that advertised a "revolutionary new product" and asked consumers to attend a local meeting to learn how to make a six-figure income. At the meeting, consumers are encouraged to purchase new products for resale.)

[470] Wells Fargo Comments at 2; HFS Comments at 8; AT&T Wireless Comments at 27-28.

[471] Wells Fargo Comments at 2; *see also* AT&T Wireless Comments at 27-28.

[472] Joe Shields Reply Comments at 6-7.

B. Discussion

1. Offers for Free Goods or Services; Information-Only Messages

139. Congress found that "residential telephone subscribers consider automated or prerecorded telephone calls . . . to be a nuisance and an invasion of privacy."[473] It also found that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion."[474] Congress determined that such prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by live telemarketers. The record reveals that consumers feel powerless to stop prerecorded messages largely because they are often delivered to answering machines and because they do not always provide a means to request placement on a do-not-call list.

140. Additionally, the term "unsolicited advertisement" means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[475] The TCPA's definition does not require a sale to be made during the call in order for the message to be considered an advertisement. Offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute "advertising the commercial availability or quality of any

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[473] *TCPA*, Section 2(10), *reprinted in* 7 FCC Rcd at 2744.

[474] *TCPA*, Section 2(12), *reprinted in* 7 FCC Rcd at 2744-45.

[475] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

property, goods, or services."[476] Therefore, the Commission finds that prerecorded messages containing free offers and information about goods and services that are commercially available are prohibited to residential telephone subscribers, if not otherwise exempted.[477]

141. In addition, we amend the prerecorded message rule at 47 C.F.R. § 64.1200(c)(2) so that the prohibition expressly applies to messages that constitute "telephone solicitations," as well as to those that include or introduce an "unsolicited advertisement."[478] We agree with those commenters who suggest that application of the prerecorded message rule should turn, not on the caller's characterization of the call, but on the purpose of the message.[479] Amending the rule to apply to messages that constitute "telephone solicitations," is consistent with the goals of the TCPA[480] and addresses the

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[476] *See* 47 U.S.C. § 227(a)(4).

[477] Therefore, a prerecorded message that contains language describing a new product, a vacation destination, or a company that will be in "your area" to perform home repairs, and asks the consumer to call a toll-free number to "learn more," is an "unsolicited advertisement" under the TCPA if sent without the called party's express invitation or permission. *See* 47 U.S.C. § 227(a)(4). However, as long as the message is limited to identification information only, such as name and telephone number, it will not be considered an "unsolicited advertisement" under our rules. *See* FTC Further Comments at 32. *But see* Joe Shields Further Comments at 4-5 (arguing that all prerecorded messages that introduce a business are by definition an advertisement).

[478] The current rule exempts from the prohibition any call that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement. *See* 47 C.F.R. § 64.1200(c)(2). We amend the rule to exempt a call that is made for a commercial purpose but does not include or introduce an unsolicited advertisement or *constitute a telephone solicitation*. *See* amended rule at 47 C.F.R. § 64.1200(a)(2)(iii).

[479] *See, e.g.*, NAAG Comments at 43.

[480] *See TCPA*, Section 2(12) and (13), *reprinted in* 7 FCC Rcd at 2744-45.

concerns raised by commenters about purported "free offers."[481] In addition, we believe the amended rule will afford consumers a greater measure of protection from unlawful prerecorded messages and better inform the business community about the general prohibition on such messages.[482]

142. The so-called "dual purpose" calls described in the record—calls from mortgage brokers to their clients notifying them of lower interest rates, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers—would, in most instances, constitute "unsolicited advertisements," regardless of the customer service element to the call.[483] The Commission explained in the *2002 Notice* that such messages may inquire about a customer's satisfaction with a product already purchased, but are motivated in part by the desire to ultimately sell additional goods or services. If the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement. Similarly, a message that seeks people to help sell or market a business' products, constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property, goods, or services, during or after the call. However, the Commission points out that, if the message is delivered by a company that has an established business relationship with the recipient, it would be permitted under our rules. We also note that absent an established business relationship, the telemarketer must first obtain the prior express consent of the

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[481] *See, e.g.*, Michael Worsham Comments at 9; Stewart Abramson Comments; City of New Orleans Comments at 8; J. Melville Capps Comments at 6.

[482] *See 2002 Notice*, 17 FCC Rcd at 17478, para. 31.

[483] Wayne G. Strang Reply Comments at 6-7.

called party in order to lawfully initiate the call. Purporting to obtain consent during the call, such as requesting that a consumer "press 1" to receive further information, does not constitute the *prior* consent necessary to deliver the message in the first place, as the request to "press 1" is part of the telemarketing call.

2. Identification Requirements

143. The TCPA rules require that all artificial or prerecorded messages delivered by an automatic telephone dialing system identify the business, individual, or other entity initiating the call, and the telephone number or address of such business, individual or other entity.[484] Additionally, the Commission's rules contain identification requirements that apply without limitation to "any telephone solicitation to a residential telephone subscriber."[485] The term "telephone solicitation" is defined to mean "the initiation of a telephone call or *message* for the purpose of encouraging the purchase or rental of . . . property, goods, or services . . ." (emphasis added).[486] We sought comment, however, on whether we should modify our rules to state expressly that the identification requirements apply to otherwise lawful artificial or prerecorded messages, as well as to live solicitation calls.[487]

144. The vast majority of consumer and industry commenters support modifying the rules to provide expressly that telemarketers must comply with the identification requirements when delivering prerecorded messages.[488] Some

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[484] *See* 47 C.F.R. § 64.1200(d).

[485] 47 C.F.R. § 64.1200(e)(2)(iv).

[486] 47 C.F.R. § 64.1200(f)(3).

[487] *2002 Notice*, 17 FCC Rcd at 17476-77, para. 28.

[488] AT&T Wireless Comments at 23; ARDA Comments at 9; ABA Comments at 4; Stewart Abramson Comments at 3; NCL Comments at 4; Carl Paulson Comments.

consumers urge the Commission to require specifically that companies provide the name of the company under which it is registered to do business.[489] They explain that a company will often use a "d/b/a" ("doing business as") or "alias" in the text of the prerecorded message, making it difficult to identify the company calling. The Commission recognizes that adequate identification information is vital so that consumers can determine the purpose of the call, possibly make a do-not-call request, and monitor compliance with the TCPA rules.[490] Therefore, we are amending our rules to expressly require that all prerecorded messages, whether delivered by automated dialing equipment or not, identify the name of the business, individual or other entity that is responsible for initiating the call, along with the telephone number of such business, other entity, or individual.[491] With respect to the caller's name, the prerecorded message must contain, at a minimum, the legal name under which the business, individual or entity calling is registered to operate. The Commission recognizes that some businesses use "d/b/as" or aliases for marketing purposes. The rule does not prohibit the use of such additional information, provided the legal name of the business is also stated. The rule also requires that the telephone number stated in the message be one that a consumer can use during normal business hours to ask not to be called again.[492] If the number provided in the message is

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[489] City of New Orleans Comments at 8; NCL Comments at 4; PRC Comments at 5-6.

[490] *See, e.g.*, Carl Paulson Comments; City of New Orleans Comments at 7-8; Joe Shields Reply Comments at 6-7.

[491] *See* amended 47 C.F.R. § 64.1200(b).

[492] This would be 9 a.m.–5 p.m., Monday through Friday, during the particular telemarketing campaign. A seller or telemarketer's telephone number must permit consumers to make their do-not-call requests in a timely manner. Therefore, the seller or telemarketer must staff the "do-not-call number" sufficiently or use an automated system for processing requests in such a way that consumers are not placed on hold or forced to

that of a telemarketer hired to deliver the message, the company on whose behalf the message is sent is nevertheless liable for failing to honor any do-not-call request. This is consistent with the rules on live solicitation calls by telemarketers.[493] If a consumer asks not to be called again, the telemarketer must record the do-not-call request, and the company on whose behalf the call was made must honor that request.

3. Radio Station and Television Broadcaster Calls

145. The TCPA prohibits the delivery of prerecorded messages to residential telephone lines without the prior express consent of the called party.[494] Commission rules exempt from the prohibition calls that are made for a commercial purpose but do not include any unsolicited advertisement.[495] The Commission sought comment on prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or similar opportunity.[496] We asked whether the Commission should specifically address these kinds of calls, and if so, how. The record reveals that such calls by radio stations and television broadcasters do not at this time warrant the adoption of new rules. Few commenters in this proceeding described either

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wait for an agent to answer the connection for an unreasonable length of time. We also reiterate the Commission's determination in its *1995 Reconsideration Order* that any number provided for identification purposes may not be a number that requires the recipient of a solicitation to incur more than nominal costs for making a do-not-call request (*i.e.*, for which charges exceed costs for transmission of local or ordinary station-to-station long distance calls). *See 1995 Reconsideration Order*, 10 FCC Rcd at 12409, para. 38. *See also* amended 47 C.F.R. § 64.1200(b)(2).

[493] *See* amended 47 C.F.R. § 64.1200(d)(3).

[494] 47 U.S.C. § 227(b)(1)(B).

[495] 47 C.F.R. § 64.1200(c)(2).

[496] *2002 Notice*, 17 FCC Rcd at 17478-79, para. 32.

receiving such messages or that they were particularly problematic.[497] The few commenters who addressed the issue were split on whether such messages fall within the TCPA's definition of "unsolicited advertisement" and are thus subject to the restrictions on their delivery.[498] We conclude that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that "does not include the transmission of any unsolicited advertisement" and under the amended rules as "a commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation."[499] The Commission reiterates, however, that messages that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any

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[497] NYSCPB states that they have not received complaints on these types of messages by radio and television stations. *See* NYSCPB Comments at 13.

[498] Thomas Pechnik Comments at 9 (prerecorded messages sent by radio stations are commercial ads covered by the TCPA); Hershovitz Comments at 3-4 (such messages clearly prohibited under the TCPA); NAB Comments at 3 (broadcaster audience invitation calls do not promote the commercial availability or quality of property, goods or services and are therefore exempted under TCPA rules); TBT Comments at 1 (invitation to listen to a radio station is not a solicitation as defined by FCC); Michael C. Worsham Comments at 9 (true purpose of call is not charitable or political); Wayne G. Strang Reply Comments at 13-14 (calls made to increase listener/viewer shares are commercial in nature, even though no sale was made or was intended to be made); Shaw Further Comments at 4 (calls to invite a consumer to listen to a radio station are regulated by the TCPA and may not be made to numbers on the do-not-call list).

[499] *See* amended 47 C.F.R. § 64.1200(a)(2)(iii). However, messages that encourage consumers to listen to or watch programming, including programming that is retransmitted broadcast programming for which consumers must pay (e.g., cable, digital satellite, etc.), would be considered advertisements for purposes of our rules.

goods or services, are "advertisements" as defined by the TCPA. Messages need not contain a solicitation of a sale during the call to constitute an advertisement.

X. ABANDONED CALLS

A. Background

146. In the *2002 Notice*, the Commission noted that various technologies are widely used by telemarketers to contact greater numbers of consumers more efficiently.[500] We explained that the use of one such technology—predictive dialing software—may result in a significant number of abandoned calls.[501] Predictive dialers initiate phone calls while telemarketers are talking to other consumers and frequently disconnect those calls when a telemarketer is unavailable to take the next call. In attempting to "predict" the average time it takes for a consumer to answer the phone and when a telemarketer will be free to take the next call, predictive dialers may either "hang-up" on consumers or keep the consumer on hold until connecting the call to a sales representative, resulting in what has been referred to as "dead air."[502] Predictive dialers reduce the amount of down time for sales agents, as consumers are more likely to be on the line when the telemarketer completes a call. Each telemarketing company can set its predictive dialer software for a predeter-

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[500] *2002 Notice*, 17 FCC Rcd at 17473-74, para. 24.

[501] *See supra* note 31 for a description of a "predictive dialer."

[502] "Dead air" may also be the result of Answering Machine Detection (AMD) software which is used to determine whether the call has reached a live person or an answering machine. AMD may be programmed to have a certain amount of time in which to determine whether an answering machine or live person has answered the call. During this time, the consumer may experience "dead air" until either the dialer transfers the called party to a sales agent or disconnects the call. *See* ECN Comments at 3-4; Alek Szlam Comments at 4.

mined abandonment rate.[503] The higher the abandonment rate, the higher the number of hang-up calls. The Commission asked what approaches we might take to minimize the harm that results from the use of predictive dialers.[504] We invited comment specifically on the possibility of setting a maximum rate on the number of abandoned calls.[505]

147. The record shows that the use of predictive dialers has, in fact, become more prevalent in the telemarketing industry.[506] The record also reveals that predictive dialers are responsible for the vast majority of abandoned telemarketing calls—both hang-ups and "dead air" calls. Individual consumers report receiving between three and ten hang-up calls each day.[507] Consumers often feel harassed or aggravated by "dead air" calls.[508] Many describe the burdens these calls impose on individuals with disabilities, who often

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[503] *See 2002 Notice*, 17 FCC Rcd at 17465, para. 7, n.38.

[504] *See 2002 Notice*, 17 FCC Rcd at 17475, para. 26.

[505] *2002 Notice*, 17 FCC Rcd at 17475-76, para. 26.

[506] *See, e.g.*, NACAA Comments at 3; Pacesetter Comments at 5; WorldCom Comments at 41. We note that the vast majority of commenters that engage in telemarketing described their use of predictive dialers.

[507] *See, e.g.*, F. Jenny Holder Comments at 1; Caroline Henriques Comments.

[508] *See, e.g.*, NCL Comments at 4 ("It is the equivalent of sending 3 door-to-door salespeople to a neighborhood with twenty homes, using a remote technology to knock on all the doors at once, and leaving seventeen homeowners standing at their doors wondering who was there."); NACAA Comments at 3-4; TOPUC Comments at 3; NAAG Comments at 34; Edwin Bailey Hathaway Comments at 1; Stewart Abramson Comments at 1; Kent Rausch Comments (worries that when his children answer the phone, there is a predator on the other end of the line).

struggle to answer the telephone.[509] Hang-ups and "dead air" calls also can be frightening for the elderly.[510] Consumers complain that they do not have an opportunity to request placement on a company's do-not-call list when predictive dialers disconnect calls.[511] Abandoned calls can also interfere with Internet usage or simply tie-up telephone lines for people telecommuting or operating businesses out of the home.[512] Many consumer groups contend that the only way to effectively alleviate these harms is to implement a zero abandonment rate on calls delivered by predictive dialers, or one as close to zero as possible.[513] Other consumer advocates support a ban on predictive dialers altogether.[514]

148. Telemarketers acknowledge that use of predictive dialers results in a certain percentage of dropped calls.[515] But they contend that predictive dialers are a valuable tool for increasing productivity and lowering costs for telemarketers and, ultimately, for consumers.[516] Some industry members

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[509] *See, e.g.*, Thomas Callahan Comments; Vivian Sinclair Comments; Carmen Brown Comments (caretaker of husband with MS); Henry Jackson Comments.

[510] *See, e.g.*, Edwin Bailey Hathaway Comments; Karen M. Meyer Comments; AARP Comments at 2.

[511] *See, e.g.*, NACAA Comments at 3; Thomas Pechnik Comments at 2; Stewart Abramson Comments at 1; Katherine S. Raulston Comments at 1.

[512] TOPUC Comments at 3.

[513] *See, e.g.*, NAAG Comments at 34-35 (a 0% abandonment rate is the appropriate standard); NASUCA Comments at 3; TOPUC Comments at 3; AARP Comments at 2; Michael C. Worsham Comments at 6.

[514] *See, e.g.*, Mathemaesthetics Comments at 6; NCL Comments at 4; Private Citizen Comments at 7.

[515] ATA Comments at 109.

[516] Pacesetter Comments at 5; Teleperformance Comments at 2; ATA Comments at 109; MBNA Comments at 7; NAA Comments at 15-16; Allstate Comments at 2.

oppose restrictions on the use of predictive dialers, maintaining that the industry has "natural incentives" to keep abandonment rates low to avoid alienating consumers.[517] Others contend that a set rate would not account for the needs of various telemarketing campaigns.[518] While many telemarketers maintain that a maximum abandonment rate would eliminate the benefits that result from the use of predictive dialers,[519] most would nevertheless support a call abandonment rate of 5 percent.[520] A few commenters, including the DMA, would not oppose a 3 percent maximum rate.[521] One industry commenter, who supported a set abandonment rate on predictive dialers, stated that if non-telemarketing entities continue to dial without restriction, consumers will be encouraged to join do-not-call lists.[522]

149. In its telemarketing proceeding, the FTC determined that a total ban on abandoned calls would amount to a ban on predictive dialers, and would not strike the proper balance between addressing an abusive practice and allowing for a technology that reduces costs for telemarketers.[523] The FTC's

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[517] ATA Comments at 109.

[518] SER Comments at 2; MPA Comments at 21.

[519] SBC Reply Comments at 4; Sytel Reply Comments at 4; DMA Reply Comments at 19.

[520] Cendant Comments at 3; CBA Comments at 8; Bank of America Comments at 5; ABA Comments at 3; DialAmerica Comments at 10; ITC Further Comments at 4.

[521] Sytel Comments at 7; DMA Comments at 31; Nextel Further Comments at 11 (stating that any Commission regulation of call abandonment rates should be no more restrictive than the maximum three percent rate established by the FTC).

[522] Sytel Reply Comments at 2, 4.

[523] *See FTC Order*, 68 Fed. Reg. at 4642. The FTC found that a three (3) percent abandonment rate was "feasible, realistic" and "fully capable" of being achieved. *Id.* at 4643. *See also* FTC Further Comments at 33-38.

amended Rule prohibits abandoned calls,[524] but provides in a "safe harbor" that a seller or telemarketer will not be deemed to have violated the TSR if the seller or telemarketer can show that its conduct conforms to certain specified standards, including a call abandonment rate of no more than three (3) percent, measured on a per day per campaign basis.[525]

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[524] Section 310.4(b)(1)(iv) of the amended TSR defines a prohibited abandoned outbound call as one in which the recipient of the call answers the call, and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. *FTC Order*, 68 Fed. Reg. at 4642. The FTC notes that this definition of abandoned call covers "dead air" and "hang-up" calls, in which the telemarketer hangs up on a called consumer without connecting that consumer to a sales representative. *Id.*

[525] Under FTC Rule 310.4(b)(4), a seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if: (i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign; (ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; (iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and (iv) the seller or telemarketer, in accordance with 310.5(b)-(d), retains records establishing compliance with 310.4(b)(4)(i)-(iii). *FTC Order*, 68 Fed. Reg. at 4643-45.

The FTC's rules on call abandonment were to go into effect on March 31, 2003. In response to petitions filed by the DMA and ATA, the FTC determined to stay the date by which it would require compliance with the abandoned call rules until October 1, 2003. The FTC concluded that "staying these provisions will provide ample time for all telemarketers who use predictive dialers to obtain, install, and test the necessary hardware or software, and should alleviate concerns that predictive dialer manufacturers might not have adequate supplies of the necessary products" by the March 31 deadline. *See* Letter from Donald S. Clark, Secretary, FTC, to Robert Corn-Revere, Ronald G. London and Paul A. Werner III, Counsel for the ATA, March 14, 2003 (available at

B. Discussion

150. Given the arguments raised on both sides of this issue as well as the FTC's approach to the problem, the Commission has determined to adopt a rule to reduce the number of abandoned calls consumers receive.[526] Under the new rules, telemarketers must ensure that any technology used to dial telephone numbers abandons no more than three (3) percent of calls answered by a person, measured over a 30-day period. A call will be considered abandoned if it is not transferred to a live sales agent within two (2) seconds of the recipient's completed greeting. When a call is abandoned within the three (3) percent maximum allowed, a telemarketer must deliver a prerecorded identification message containing only the telemarketer's name, telephone number, and notification that the call is for "telemarketing purposes." To allow time for a consumer to answer the phone, the telemarketer must allow the phone to ring for fifteen seconds or four rings before disconnecting any unanswered call. Finally, telemarketers using predictive dialers must maintain records that provide clear and convincing evidence that the dialers used comply with the three (3) percent call abandonment rate, "ring time" and two-second-transfer rule.

1. Maximum Rate on Abandoned Calls

151. The Commission believes that establishing a maximum call abandonment rate is the best option to reduce effectively the number of hang-ups and "dead air" calls consumers experience. We recognize that industry generally

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<http://www.ftc.gov/os/2003/03/030314ataletter.htm>). *See also Telemarketing Sales Rule* (Federal Trade Comm'n, Stay of Compliance Date), 68 Fed. Reg. 16414 (April. 4, 2003).

[526] *See 2002 Notice*, 17 FCC Rcd at 17475-76, para. 26 (seeking comment on what approaches we might take to minimize any harm that results from the use of predictive dialers and on alternative approaches to the problems associated with abandoned calls).

advocates a five percent abandonment rate, claiming that a rate lower than five percent would reduce efficiencies the technology provides.[527] However, the Commission is not convinced that a five percent rate will lead to a reasonable reduction in the number of abandoned calls. The DMA's current guideline, cited by many commenters, calls for an abandonment rate of no higher than five percent.[528] And several telemarketers maintain that they now utilize an abandonment rate of five percent or lower in their calling campaigns.[529] Consumers nevertheless report receiving as many as 20 dropped calls per day that interrupt dinners, interfere with home business operations, and sometimes frighten the elderly and parents with young children.[530] A rule that is consistent with the FTC's will effectively create a national standard with which telemarketers must comply and should lead to fewer abandoned calls, while permitting telemarketers to continue to benefit from such technology. It is also responsive to Congress' mandate in the Do-Not-Call Act to maximize consistency with the FTC's rules.

152. The three percent abandonment rate will be measured over a 30-day period, a standard supported by several industry commenters.[531] Industry members maintain that

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[527] However, some industry commenters indicate that a 3 percent rate still obtains productivity benefits. *See, e.g,* WorldCom Comments at 44.

[528] *See* <http://www.the-dma.org/guidelines/dotherightthing.pdf.>

[529] *See, e.g.*, Sprint Comments at 6 (uses 5%); CMOR Comments at 6 (uses a 1% rate); WorldCom Comments at 44 (uses 3-5%); *see also* ATA Reply Comments at 70 (many telemarketers from all industries use a 5% limit on abandoned calls); Technion Comments at 5 (uses 5% abandonment rate).

[530] *See, e.g.*, Edwin Bailey Hathaway Comments; Stewart Abramson Comments at 1; Kent Rausch Comments.

[531] Reese Comments at 7; ERA Comments at 16; MPA Comments at 20; DMA Reply Comments at 19-20; DialAmerica Reply Comments at 3-4 (noting that California allows compliance with its abandoned call rules

measuring the abandonment rate on a per day basis would severely curtail the efficiencies gained from the use of predictive dialers, and may be overly burdensome to smaller telemarketers. A per day measurement, they argue, would not account for short-term fluctuations in marketing campaigns.[532] They further argue that the impact of abandoned calls on consumers depends more on the aggregate number of contacts made by a telemarketer over time and not on the number in any given day.[533] The Commission believes that a three (3) percent abandonment rate measured over a 30-day period will ensure that consumers consistently receive fewer disconnected calls, and that telemarketers are permitted to manage their calling campaigns effectively under the new rules on abandoned calls. Although we recognize that this rate of measurement differs from the FTC's rule, we believe a rate measured over a longer period of time will allow for variations in telemarketing campaigns such as calling times, number of operators available, number of telephone lines used by the call centers, and other similar factors.[534] The record also suggests that an abandonment rate measured over a 30-day period will allow telemarketers to more easily

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over a 30-day period); DialAmerica Further Reply Comments at 5 (stating that it can achieve an average abandonment rate of 5% or less when the measuring period spans a month).

[532] WorldCom Reply Comments at 20; WorldCom Further Comments at 8 (advocating that the abandonment rate be measured over a six-month period); Teleperformance Further Comments at 4; *see also* MPA Comments at 21.

[533] *See, e.g.*, Reese Comments at 7; WorldCom Reply Comments at 20.

[534] *See* ERA Comments at 16; Stonebridge Further Comments at 6 (three percent abandonment rate imposes an unnecessary burden on telemarketers, which should be alleviated by eliminating any reference to a per-day measure); Teleperformance Further Comments at 3.

comply with the recordkeeping requirements associated with the use of predictive dialers.[535]

2. Two-Second-Transfer Rule

153. The record confirms that many consumers are angered by the "dead air" they often face when answering the telephone. Running to the telephone only to be met by silence can be frustrating and even frightening, if the caller cannot be identified.[536] To address the problem of "dead air" produced by dialing technologies, the Commission has determined that a call will be considered abandoned if the telemarketer fails to connect the call to a sales representative within two (2) seconds of the person's completed greeting.[537] Calls disconnected because they were never answered (within the required 15 seconds or 4 rings) or because they received busy signals will not be considered abandoned.[538] This requirement is consistent with the FTC's rule.[539]

154. *Answering Machine Detection.* Opposition from industry to the two-second-transfer requirement appears to be based largely on its implications for use of Answering Machine Detection (AMD).[540] Some industry members

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[535] *See* WorldCom Reply Comments at 19-20; Reese Comments at 7.

[536] *See, e.g.,* Katherine S. Raulston Comments; Edwin Bailey Hathaway Comments; NAAG Comments at 34.

[537] *See supra* discussion on the use of prerecorded messages, paras. 136-144.

[538] Calls that reach voicemail or an answering machine will not be considered "answered" by the called party. Therefore, a call that is disconnected upon reaching an answering machine will not be considered an abandoned call.

[539] *See* 16 C.F.R. § 310.4(b)(1)(iv).

[540] *See, e.g.,* MBNA Comments at 7-8; ATA at 112. *But see* Reese Comments at 6 ("Abandons should not be defined so as to include any measure of 'time to transfer,' as these timings are not available in currently installed dialers.").

explain that AMD is used by telemarketers to detect answering machines, and thereby avoid leaving messages on them.[541] The ATA and DMA maintain that if telemarketers are required to connect to a sales agent or message within 1-2 seconds, a large percentage of calls reaching answering machines will be transferred to sales agents, thereby reducing the efficiencies gained from AMD.[542] According to these commenters, 1-2 seconds is often insufficient for AMD to determine accurately if the call has reached an answering machine.[543] Other commenters explain that AMD is used instead by telemarketers to transmit prerecorded messages to answering machines; in such circumstances, calls that reach live persons are disconnected.[544] It is unclear from the record

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[541] Technion Comments at 5.

[542] ATA Comments at 117 (suggesting a 4-second transfer requirement); DMA Reply Comments at 19 ("AMD serves perfectly legitimate business purposes causing negligible harm to consumers, but current technology simply will not ensure that 'dead air' lasts less than five seconds.").

[543] *But see* Alek Szlam Comments at 5 (stating that "[o]ne possible solution is to require the threshold in the AMD to be set to err on the side of connecting vs. disconnecting. If the dialer cannot determine within the first second whether it is a live call or answering machine, it will assume that it is a live call and connect it to an agent. On the agent side, when they are passed a call that turns out to be an answering machine, they should have the ability to quickly terminate the call or to push a button to play a message. This approach will reduce the amount of dead air, while not significantly impacting the productivity of the call center agent."). *See also* Sytel Comments at 5 ("We believe that the loss of productivity (measured in terms of talk time per agent hour) that results when answering machines are connected to agents in call centers is not significant when set against the improvement in call quality that results from having live calls connected to agents immediately i.e. not exposing consumers to 'dead air' whilst detection is done by the switch.").

[544] *See* DialAmerica Comments at 10; ABA Comments at 4; Hershovitz Comments at 9. We reiterate that under the TCPA, it is unlawful to initiate any telephone call to any residential line using a prerecorded message without the prior express of the called party, absent

how prevalent the use of AMD is in the telemarketing industry. One commenter stated that the elimination of AMD would put "consumer-oriented" telemarketing firms out of business.[545] However, other industry members acknowledge that AMD contributes significantly to the amount of "dead air" consumers experience,[546] and one large telemarketing firm maintains that AMD should be banned completely.[547] The Commission believes that the record does not warrant a ban on the use of AMD. Instead, if the AMD technology is deployed in such a way that the delay in transfer time to a sales agent is limited to two seconds, then its continued use should not adversely affect consumers' privacy interests.[548]

3. Prerecorded Message for Identification

155. As noted above, the FTC's "safe harbor" provisions require that, when a sales agent is unavailable to speak to a person answering the phone, marketers deliver a prerecorded message that states the name and telephone number of the seller on whose behalf the call was made.[549] The Commission has similarly determined that when a telemarketer abandons a

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an emergency or an exemption by Commission rule or order. Delivery of a message to an answering machine does not render the call lawful. *See* 47 U.S.C. § 227(b)(1)(B).

[545] Reese Comments at 9; *see also* Convergys Comments at 7 ("Elimination of the use of AMD would cause Convergys to re-revaluate its participation in the industry.")

[546] Sytel Comments at 3-4; Alek Szlam Comments at 4.

[547] DialAmerica Comments at 10.

[548] *See* Sytel Comments at 3-5. The Commission notes that in addition to requiring the delivery of a prerecorded identification message when a call is abandoned, Commission rules also permit prerecorded messages in limited circumstances, including when a company has an established business relationship with a consumer. *See* 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2).

[549] *See* FTC's amended TSR at 16 C.F.R. § 310.4(b)(4)(iii); *see also FTC Order*, 68 Fed. Reg. at 4644.

call under the three (3) percent rate allowed, the telemarketer must deliver a prerecorded message containing the name of the business, individual or other entity initiating the call, as well as the telephone number of such business, individual or other entity. The message must also state that the call is for "telemarketing purposes."[550] We recognize that many consumers are frustrated with prerecorded messages.[551] However, the record also reveals that consumers are frightened and angered by "dead air" calls and repeated hang-ups. A prerecorded message, limited to identification information only, should mitigate the harms that result from "dead air," as consumers will know who is calling them.[552] And, they will more easily be able to make a do-not-call request of a company by calling the number provided in the message. We note that such messages sent in excess of the three (3) percent allowed under the call abandonment rate, will be considered abandoned calls, unless otherwise permitted by our rules. The content of the message must be limited to name and telephone number, along with a notice to the called party that the call is for "telemarketing purposes." The message may not be used to deliver an unsolicited advertisement.[553] We caution that additional information in

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[550] By requiring such notice, we believe consumers will be less likely to return the call simply to learn the purpose of the call and possibly incur unnecessary charges.

[551] *See supra* para. 137. *See also* Wayne G. Strang Further Comments at 5-6.

[552] *See, e.g.*, NASUCA Further Reply Comments at 8-9 (because the FTC's identification requirements mitigate the nuisance aspects of abandoned calls, the FCC should make an exception for prerecorded messages that are used to comply with the FTC's safe harbor provision).

[553] As long as the message is limited to identification information only, it will not be considered an "unsolicited advertisement" under our rules. *See* FTC Further Comments at 32. *But see* Joe Shields Further Comments at 4-5 (arguing that all prerecorded messages that introduce a business are by definition an advertisement).

the prerecorded message constituting an unsolicited advertisement would be a violation of our rules, if not otherwise permitted under 47 C.F.R. § 64.1200(a)(2).[554]

4. Established Business Relationship

156. While the TCPA prohibits telephone calls to residential phone lines using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, the Commission determined that the TCPA permits an exemption for established business relationship calls from the restriction on artificial or prerecorded message calls to residences.[555] As discussed in detail above, the record reveals that an established business relationship exemption is necessary to allow companies to contact their existing customers.[556] Companies currently use prerecorded messages, for example, to notify their customers about new calling plans, new mortgage rates, and seasonal services such as chimney sweeping and lawn care.[557] Therefore, prerecorded messages sent by companies to customers with whom they have an established business relationship will not be considered "abandoned" under the revised rules, if they are delivered within two (2) seconds of the person's completed greeting. Similarly, any messages initiated with the called

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[554] *See supra* discussion on prerecorded messages, paras. 136-144. Contrary to the claims of some parties, even an incidental reference to a product or service could transform the identification message into a prohibited unsolicited advertisement. *See* Nextel Further Comments at 14-15.

[555] *See 1992 TCPA Order*, 7 FCC Rcd at 8770-71, para. 34.

[556] *But see* FTC Further Comments at 40-41 ("The FCC may need to eliminate the established business relationship exemption with respect to prerecorded message calls, especially if, as the FTC urges, it includes in its revised TCPA regulations provisions addressing the practice of call abandonment and creating a safe harbor.")

[557] *See, e.g.*, NAAG Comments at 39; Joe Shields Reply Comments at 6-7.

party's prior express consent and delivered within two (2) seconds of the called person's completed greeting are not "abandoned" calls under the new rules.[558] Such messages must identify the business, individual or entity making the call and contain a telephone number that a consumer may call to request placement on a do-not-call list. We recognize that the established business relationship exception to the prohibition on prerecorded messages conflicts with the FTC's amended rule.[559] However, for the reasons described above, we believe the current exception is necessary to avoid interfering with ongoing business relationships.

5. Ring Duration

157. The Commission also adopts a requirement that telemarketers allow the phone to ring for 15 seconds or four (4) rings before disconnecting any unanswered call. This standard is consistent with that of the FTC, similar to current DMA guidelines,[560] and used by some telemarketers already.[561] One industry commenter asserted that telemarketers often set the predictive dialers to ring for a very short period of time before disconnecting the call; in such cases, the predictive dialer does not record the call as having been abandoned.[562] The practice of ringing and then disconnecting the call before the consumer has an opportunity to answer the phone is intrusive of consumer privacy and serves only to increase efficiencies for telemarketers. Moreover, in discussing the interplay between the FTC's rules with the

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[558] *See* amended 47 C.F.R. § 64.1200(a)(6)(i).

[559] *See* FTC Further Comments at 40-41 (under the FTC's amended rules, such prerecorded messages would be prohibited as abandoned calls).

[560] DMA Comments, Exhibit 1 (Guidelines for Ethical Business Practice) at 23.

[561] WorldCom Reply Comments at 20-21.

[562] Sytel Comments at 3.

Commission's rules, very few commenters opposed the "ring time" requirement adopted by the FTC,[563] or raised any particular concerns about how it might work in the TCPA framework. Therefore, given the substantial interest in protecting consumers' privacy interests, as well as Congress's direction to maximize consistency with the FTC's rules, we have determined to adopt the 15 second or four (4) ring requirement.

158. Finally, consistent with the FTC's rules, the Commission has determined that telemarketers must maintain records establishing that the technology used to dial numbers complies with the three (3) percent call abandonment rate, "ring time," and two-second rule on connecting to a live sales agent. Telemarketers must provide such records in order to demonstrate compliance with the call abandonment rules. Only by adopting a recordkeeping requirement will the Commission be able to adequately enforce the rules on the use of predictive dialers.

159. The TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing calls, and therefore exempts calls or messages by tax-exempt nonprofit organizations from the definition of telephone solicitation.[564] Therefore, the Commission has determined not to extend the call abandonment rules to tax-exempt nonprofit organizations in the absence of further guidance from Congress.[565]

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[563] WorldCom indicated that such recommendation should not be implemented, yet stated that its dialers are programmed to disconnect the call if there is no answer after 4 ring cycles, which provides sufficient time for a consumer to reach the phone. *See* WorldCom Reply Comments at 20-21.

[564] *See 1992 TCPA Order*, 7 FCC Rcd at 8773-74, para. 40.

[565] Because this will result in an inconsistency with the FTC's rules, we will discuss the call abandonment rules in the report due to Congress within 45 days after the promulgation of final rules. *See* Do-Not-Call Act, Section 4.

However, the call abandonment rules will apply to all other companies engaged in telemarketing, and the existence of an established business relationship between the telemarketer and consumer will not be an exception to these rules. For these entities, the call abandonment rules will become effective on October 1, 2003. We decline to establish an effective date beyond October 1, 2003, which is consistent with the date that telemarketers must comply with the FTC's call abandonment rules.[566] This should permit telemarketers to make any modifications to their autodialing equipment or purchase any new software to enable them to comply with the three (3) percent call abandonment rate, the prerecorded message requirement and the two-second-transfer rule.

XI. WIRELESS TELEPHONE NUMBERS

A. Background

160. In the *2002 Notice*, the Commission noted that the TCPA permits the Commission to exempt from the restrictions on autodialer or prerecorded message calls, "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights [the TCPA] is intended to protect."[567] In the *1992 TCPA Order*, the Commission concluded that calls made by *cellular carriers* to their subscribers for which the subscribers were not charged do not fall within the prohibitions on autodialers or prerecorded messages.[568] We sought comment on the extent to which telemarketing to wireless consumers exists today and if so,

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[566] *See* Notices of *Ex Parte Presentations* from WorldCom to FCC, filed May 23, 2003 and June 16, 2003 (advocating a 9.5-month implementation period for the call abandonment rules).

[567] *2002 Notice*, 17 FCC Rcd at 17485, para. 45 (footnote omitted); *see also* 47 U.S.C. § 227(b)(2)(C).

[568] *1992 TCPA Order*, 7 FCC Rcd at 8775, para. 45.

the nature and frequency of such solicitations.[569] We asked whether there are other types of calls to wireless telephone numbers that are not charged to the called party, and whether such calls also should not fall within the prohibitions on autodialers or prerecorded messages.[570] We also sought comment on any developments anticipated in the near future that may affect telemarketing to wireless phone numbers. Specifically, we asked how telemarketers will identify wireless numbers in order to comply with the TCPA when consumers are able to port numbers from their wireline phones to wireless phones,[571] or receive numbers from a thousands-block[572] that was part of a central office code previously assigned to a wireline carrier.[573] The Commission further sought comment on whether the Commission's rules should be modified to facilitate telemarketers' efforts to comply with the TCPA.

161. *Local Number Portability and Pooling.* The Commission's local number portability (LNP) decisions date back to 1996, with the Commission granting a number of extensions to the effective date for wireless carriers,

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[569] *2002 Notice*, 17 FCC Rcd at 17485, para. 43.

[570] *2002 Notice*, 17 FCC Rcd at 17485, para. 45

[571] Wireless carriers will begin providing local number portability (LNP) on November 24, 2003. LNP "means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). *See also* 47 C.F.R. § 52.21(k).

[572] Wireless carriers began participating in thousands-block number pooling (pooling) on November 24, 2002. Thousands-block number pooling is a process by which the 10,000 numbers in a central office code (NXX) are separated into to sequential blocks of 1,000 numbers each (thousands-blocks), and allocated separately within a rate center. *See* 47 C.F.R. § 52.20(a).

[573] *2002 Notice*, 17 FCC Rcd at 17485-86, para. 46.

providing the industry and other interested parties with extensive advance notice of the impending implementation of wireless LNP. The Commission determined in the *Number Portability First Report and Order* that LECs and certain CMRS providers operating in the 100 largest MSAs must offer local number portability, according to a phased deployment schedule.[574] This requirement was subsequently limited by the *Number Portability First Order on Reconsideration*, in which the Commission concluded that LECs and covered CMRS providers were required only to deploy LNP within switches for which another carrier has made a specific request for the provision of LNP.[575] CMRS carriers are required to implement LNP on November 24, 2003, for switches in the top 100 MSAs requested by February 24, 2003.[576] After November 24, 2003, CMRS carriers have 30 to 180 days from the request date to implement number portability for switches in the top 100 MSAs not previously requested and for switches outside the top 100 MSAs.[577]

162. In the *Numbering Resource Optimization First Report and Order*, the Commission established national thousands-

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[574] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8393, para. 77 (1996) (*Number Portability First Report and Order*).

[575] *Telephone Number Portability*, CC Docket No. 95-116, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, 7272-3, paras. 59-60 (1997) (*Number Portability First Order on Reconsideration*).

[576] *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, WT Docket No. 01-184, and *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order, 17 FCC Rcd 14972, 14981, para. 23 *affirmed CTIA v. FCC*, No. 02-1264, 2003 WL 21293569 (D.C. Cir. June 6, 2003).

[577] *Id.* at 14985-86.

block number pooling (pooling) as an LNP-based numbering resource optimization measure designed to help slow the pace of area code and North American Numbering Plan (NANP) exhaust.[578] This measure involves breaking up the 10,000 numbers in an NXX into ten sequential blocks of 1,000 numbers each, and allocating each thousands-block to a different service provider, and possibly a different switch, within the same rate center. The Commission mandated participation in national pooling by all carriers that are required to be LNP-capable, because it believed that LNP capability was required before a carrier could participate in thousands-block number pooling.[579] In the *Numbering Resource Optimization Fourth Report and Order*, the Commission determined that thousands-block number pooling need not be linked to a carrier's ability to provide LNP because a carrier can participate in pooling once it deploys the location routing number architecture.[580] The Commission, therefore, concluded that all carriers, except those specifically exempted, are required to participate in thousands-block number pooling in accordance with the

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[578] *Numbering Resource Optimization*, CC Docket No. 99-200, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574 (2000) (*Numbering Resource Optimization First Report and Order*).

[579] *Numbering Resource Optimization,* CC Docket No. 99-200, Third Order on Reconsideration in CC Docket No. 99-200, Third Further Notice of Proposed Rulemaking in CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 95-116. 17 FCC Rcd 4784 at 4787, para. 9 (2002).

[580] *Numbering Resource Optimization Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability*, CC Docket Nos. 99-200, 96-98, and 95-116, Fourth Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 03-126 (rel. June 18, 2003), para. 11 (*Numbering Resource Optimization Fourth Report and Order*).

national rollout schedule,[581] regardless of whether they are required to provide LNP, including covered CMRS providers.[582]

163. *Telemarketing to Wireless Numbers.* The record suggests that while consumers receive telemarketing calls on their wireless phones, it is not a widespread practice at this time.[583] However, some industry members believe that telemarketing calls to wireless numbers are likely to increase,[584] particularly as growing numbers of consumers use wireless phones as their primary phones.[585] One commenter pointed out that the record in this proceeding demonstrates that telemarketers would like to solicit consumers on their wireless phones.[586] Although the record does not reflect the full panoply of methods telemarketers currently use to avoid calling wireless telephone numbers, the record provides a

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[581] *Numbering Resource Optimization Fourth Report and Order. See also Numbering Resource Optimization*, CC Docket No. 99-200, Order, 17 FCC Rcd 7347 (2002) (*Pooling Rollout Schedule*).

[582] *See Verizon Wireless Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, WT Docket No. 01-184, and Telephone Number Portability, CC Docket No. 95-116, Memorandum Opinion and Order, 17 FCC Rcd 14972, *affirmed CTIA v. FCC*, No. 02-1264, 2003 WL 21293569 (D.C. Cir. June 6, 2003).

[583] *But see* April Jordan Comments at 1; Mark A. Hiner Comments at 2; Rhett Riviere Comments (all three of whom received marketing calls on their cell phones); AT&T Wireless Comments at 29 ("little telemarketing is directed to wireless subscribers . . . [although] such activity likely will increase.").

[584] *See, e.g.*, CTIA Comments at 5 ("having built it, [they] will come"); AT&T Wireless Comments at 29 (reported receiving some complaints from customers regarding calls to wireless phones).

[585] ARDA Comments at 12; BellSouth Comments at 6-7. *But see* Nextel Comments at 21-22 (whose report indicates that only 3 percent of wireless service subscribers have used their mobile phones to displace traditional residential landline service).

[586] AT&T Wireless Reply Comments at 21.

sampling of such methods.[587] For example, the Direct Marketing Association's (DMA) Telephone Preference Service allows consumers to opt-out of national telemarketing lists, allowing consumers to register their wireless phone numbers in order to ensure that they do not receive telemarketing calls on their wireless phones.[588] Additionally, the DMA has created the "Wireless Telephone Suppression Service."[589] A number of commenters contended that telemarketing to wireless phones is not a significant problem, indicating that the industries' voluntary efforts have been successful.[590] Commenters also state that the wireless and telemarketing industries have been actively working together to ensure that telemarketing does not become a problem for wireless customers.[591]

164. Most consumer groups maintain that all telemarketing calls to wireless numbers should be prohibited, regardless of whether they are made using an autodialer, prerecorded message, or live sales agent.[592] The vast majority of consumer

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[587] Cingular Wireless Comments at 5; DMA Comments at 35; NeuStar Comments at 2.

[588] *See* <http://www.dmaconsumers.org/cgi/offtelephonedave> (accessed June 2, 2003).

[589] Cingular Wireless Comments at 5. This service provides a list of 280 million phone numbers that are currently used or have been set aside for CMRS carriers. *Id.*

[590] American Bankers Association Comments at 5; AT&T Wireless Comments at 29; American Teleservices Association Reply at 78; Cingular Wireless Comments at 4; AT&T Wireless Reply at 21. One commenter, however, state that calls to wireless phones are an existing and growing problem. CTIA Comments at 5. *See also* AT&T Wireless Reply at 21 ("...it is likely that telemarketing to wireless phones will increase. . . ").

[591] Cingular Wireless Comments at 4-5.

[592] *See, e.g.*, NASUCA Comments at 19 (suggesting that telemarketing calls to wireless phones be prohibited unless expressly authorized by the

advocates contend that telemarketing calls to cell phones are as intrusive of consumers' privacy interests as calls to landline phones.[593] Some believe they are more so, as consumers carry their cell phones on their persons, to work, and while driving.[594] Some also contend the prohibition should apply whether the consumer incurs a per-minute charge or a reduction from a "bucket" of minutes purchased at a fixed rate.[595] A few industry commenters agree that wireless subscribers should be protected from telemarketing calls to their wireless numbers.[596] Other industry members contend that wireless phones should be treated like wireline phones, in part because of the difficulty in distinguishing between wireline and wireless numbers.[597] American General Finance argues that the incremental cost of receiving a cell phone call is not significantly different from the cost of receiving a non-cellular call.[598] Some commenters suggest permitting calls to wireless numbers when there is an

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subscriber); NCL Comments at 6-7; TOPUC Comments at 7; NAAG Comments at 35-36.

[593] *See, e.g.*, J. Melville Capps Comments; City of New Orleans Comments at 12.

[594] *See* J. Melville Capps Comments; J. Shaw Comments at 5; NCL Comments at 6-7; City of Chicago Comments at 13; NAAG Comments at 35-36; EPIC Comments at 13 (arguing that many consider their wireless phone more personal than their wireline phone).

[595] *See* NAAG Comments at 35; CTIA Comments at 4-5 (arguing that the depletion of one's minutes by unwanted telemarketing calls is a cost. Telemarketers have no way of knowing what rate plan a consumer has.).

[596] *See* Sprint Comments at 10; Verizon Wireless Reply Comments at 7 (noting that statutory prohibition on autodialing and artificial messages to wireless service is absolute).

[597] ATA Comments at 126-128; ATA Reply Comments at 77-80; CBA Comments at 9 (arguing that premature amendments to the rules could stifle the evolution of mobile commerce).

[598] AGF Comments at 2.

established business relationship,[599] when the calls are made for survey research purposes,[600] or when consumers have provided their cell phone numbers to the calling entity.[601] The ATA urges the Commission to find that calls to cellular telephones are not "charged to the called party" as contemplated by the TCPA's restriction on autodialed calls.[602]

B. Discussion

1. Telemarketing Calls to Wireless Numbers

165. We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number.[603] Both the statute and our rules[604] prohibit these calls, with limited exceptions, "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier

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[599] *See, e.g.*, AGF Comments at 1.

[600] CMOR Comments at 7 (if calls to cell phones are not permitted, the quality of survey research will be harmed). *But see* John Shaw Reply Comments at 13 (if survey calls are exempted from the TCPA, many sham surveys could result as telemarketers try to circumvent the regulations).

[601] HFS Comments at 10; BellSouth Comments at 6-7; Bank of America Comments at 6; AGF Comments at 1.

[602] ATA Comments at 130-134. *See also* HFS Comments at 10 (urging the Commission to permit even those calls to wireless numbers made by autodialers and prerecorded messages).

[603] *See* 47 U.S.C. § 227(b)(1), which provides that it is "unlawful for any person within the United States to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."

[604] 47 C.F.R. § 64.1200(a)(1)(iii).

service, or any service for which the called party is charged."[605] This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.[606] Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls.[607] Moreover, such calls can be costly and inconvenient.[608] The Commission has long recognized, and the record in this proceeding supports the same conclusion, that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.[609] Wireless subscribers who purchase a large "bucket" of minutes at a fixed rate nevertheless are charged for those minutes, and for any minutes that exceed the "bucket" allowance. This "bucket" could be exceeded more quickly if consumers receive numerous unwanted telemarketing calls.[610] Moreover, as

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[605] 47 U.S.C. § 227(b)(1)(A)(iii).

[606] SMS, for example, "provides the ability for users to send and receive text messages to and from mobile handsets with maximum message length ranging from 120 to 500 characters." *Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 17 FCC Rcd 12985, 13051 (2002).

[607] *TCPA*, Section 2(10), *reprinted in* 7 FCC Rcd at 2744. The TCPA prohibits the initiation of any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is exempted by Commission rule or order. See 47 U.S.C. § 227(b)(1)(B).

[608] *See, e.g.*, Verizon Wireless Comments at 11; J. Shaw Comments at 5; NAAG Comments at 40-41.

[609] *See, e.g.*, AT&T Wireless Comments at 24.

[610] Consistent with our determination in 1992, calls made by cellular carriers to their subscribers, for which subscribers are not charged in any way for the call (either on a per minute, per call, or as a reduction in their "bucket" of minutes) are not prohibited under the TCPA. *See* Verizon

several commenters point out, telemarketers have no way to determine how consumers are charged for their wireless service.

166. Although the same economic and safety concerns apply to all telephone solicitation calls received by wireless subscribers, the Commission has determined not to prohibit all live telephone solicitations to wireless numbers.[611] The national do-not-call database will allow for the registration of wireless telephone numbers for those subscribers who wish to avoid live telemarketing calls to their wireless phones. Wireless subscribers thus have a simple means of preventing most live telemarketing calls if they so desire.[612] Moreover, relying on the do-not-call database to control live telephone solicitations recognizes that prohibiting such calls to wireless numbers may unduly restrict telemarketers' ability to contact those consumers who do not object to receiving telemarketing calls[613] and use their wireless phones as either their primary or only phone.[614]

Wireless Comments at 11 (noting that for "bucket" plans, exceeding the bucket allowance is not unusual).

[611] We note, however, that the TCPA already prohibits live solicitation calls to wireless numbers using an autodialer. *See* 47 U.S.C. § 227(b)(1).

[612] Registration on the do-not-call database will not prevent calls from entities that have an established business relationship with a wireless subscriber. Wireless subscribers who receive such live calls can easily make a company-specific do-not-call request. Moreover, we note that the record reveals that telemarketing to wireless numbers is not widespread at this time.

[613] *See* Bell South Comments at 6-7; ARDA Comments at 12.

[614] A USA Today/CNN/Gallop poll found that almost one in five mobile telephony users regard their wireless phone as their primary phone. *2002 CMRS Competition Report*, Section II.A.1.e, citing Michelle Kessler, *18% See Cellphones as Their Main Phone,* USA Today, Feb. 1, 2002.

167. The Commission's rules provide that companies making telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists.[615] For the reasons described above,[616] we conclude that these rules apply to calls made to wireless telephone numbers. We believe that wireless subscribers should be afforded the same protections as wireline subscribers.[617]

2. Wireless Number Portability and Pooling

168. Based on the evidence in the record, we find that it is not necessary to add rules to implement the TCPA as a result of the introduction of wireless LNP and thousands-block number pooling. The TCPA rules prohibiting telemarketers from placing autodialed and prerecorded message calls to wireless numbers have been in place for twelve years.[618] Further, the Commission's pooling requirements have been in place for several years and the porting requirements have been in place for over five years. Accordingly, telemarketers have received sufficient notice of these requirements in order to develop business practices that will allow them to continue to comply with the TCPA.

169. Additionally, telemarketers have taken measures in the past to identify wireless numbers, and there is no indication that these measures would not continue to be effective for identifying wireless numbers affected by pooling and porting. As noted above, the industry currently makes use of a variety of tools to enable it to avoid making prohibited

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[615] *See* 47 C.F.R. § 64.1200(e).

[616] *See supra* paras. 33-36. *See also* 47 U.S.C. § 227(b)(1)(A)(iii).

[617] *See, e.g.*, Citigroup Comments at 6; Cingular Wireless Comments at 6-7; John Shaw Reply Comments at 14.

[618] *See supra* paras. 160-163.

calls. As discussed in detail *supra*,[619] the record provides a sampling of methods, including the DMA's "Wireless Telephone Suppression Service," that telemarketers use to avoid making prohibited calls to wireless numbers.[620]

170. LNP and pooling do not make it impossible for telemarketers to comply with the TCPA. The record demonstrates that information is available from a variety of sources to assist telemarketers in determining which numbers are assigned to wireless carriers. For example, NeuStar as the North American Numbering Plan Administrator, the National Pooling Administrator, and the LNP Administrator makes information available that can assist telemarketers in identifying numbers assigned to wireless carriers. Also, other commercial enterprises such as Telcordia, the owner-operator of the Local Exchange Routing Guide (LERG) maintain information that can assist telemarketers in identifying numbers assigned to wireless carriers. We acknowledge that beginning November 24, 2003, numbers previously used for wireline service could be ported to wireless service providers and that telemarketers will need to take the steps necessary to identify these numbers. We also note that there are various solutions that will enable telemarketers to identify wireless numbers in a pooling and number portability environment. We decline to mandate a specific solution, but rather rely on the telemarketing industry to select solutions that best fit telemarketers' needs. The record demonstrates that telemarketers have found adequate methods in the past to comply with the TCPA's prohibition on telephone calls using an autodialer or an artificial or prerecorded voice message to any telephone number assigned to a cellular telephone service, a paging service, or any service for which the called party is

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[619] *See supra* para. 163.

[620] Cingular Wireless Comments at 5; DMA Comments at 35; Letters from Neustar to FCC, filed January 23, 2003 and May 5, 2003.

charged for the call. We expect telemarketers to continue to make use of the tools available in the marketplace in order to ensure continued compliance with the TCPA.[621]

171. Moreover, the record indicates that telemarketing to wireless phones is not a significant problem, indicating that the industries' voluntary efforts have been successful.[622] Commenters further declare that the wireless and telemarketing industries have been actively working together to ensure that telemarketing does not become a problem for wireless customers.

172. Finally, we reject proposals to create a good faith exception for inadvertent autodialed or prerecorded calls to wireless numbers and proposals to create implied consent because we find that there are adequate solutions in the marketplace to enable telemarketers to identify wireless numbers.[623]

XII. CALLER IDENTIFICATION

A. Background

173. In the *1992 TCPA Order*, the Commission considered whether to require telemarketers to use a special area code or telephone number prefix that would allow consumers to block unwanted telephone solicitations using a caller identification (caller ID) service. Based on cost and the "technological

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[621] *See* Letter from Neustar to FCC, filed June 4, 2003.

[622] ABA Comments at 5; AT&T Wireless Comments at 29; Cingular Wireless Comments at 4; ATA Reply Comments at 78; AT&T Wireless Reply Comments at 21.

[623] *See* ATA Comments at 134-36; BMO Financial Group Comments at 6; Sprint Comments at 21; ATA Reply Comments at 82. Commenters also suggest other exceptions, such as where a subscriber uses wireless as his sole telephone service, AGF Comments at 1, or where the subscriber provides his wireless number as a contact number to a business. *Id. See also* Bank of America Comments at 6; CBA Comments at 9; BellSouth Comments at 6-7.

uncertainties associated with implementation," the Commission declined to adopt any type of network technologies to accomplish the objectives of the TCPA.[624]

174. In the *2002 Notice*, the Commission sought comment on whether network technologies have been developed over the last decade that may allow consumers to avoid receiving unwanted telephone solicitations. The Commission sought comment specifically on whether to require telemarketers to transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information.[625] Comments filed by consumers, state utility commissions, and wireless service providers generally support a requirement that telemarketers transmit caller identification information.[626] Consumers are frustrated by the failure of many telemarketers to transmit caller ID information, which, under certain circumstances, makes it difficult for consumers to enforce the TCPA.[627] Commenters also noted that the increased use of predictive dialers has led to a corresponding increase in the number of hang-ups. Caller ID information would allow consumers, they contend, to identify those telemarketers responsible for hang-

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[624] *See 1992 TCPA Order*, 7 FCC Rcd at 8762, para. 17.

[625] *2002 Notice*, 17 FCC Rcd at 17473, para 22.

[626] Thomas Pechnik Comments at 4; TOPUC Comments at 3; Wayne G. Strang Comments at 15; Michael C. Worsham Comments at 4; Samuel E. Whitley Comments at 2; HFS Comments at 6; CTIA Comments at 7; Michael J. Blitch Comments at 5; AT&T Wireless Comments at 23; ARDA Comments at 9; Louis J Hoppman Jr. Comments; PUC of Ohio Comments at 19; TN AG Comments at 13; DialAmerica Comments at 11-12; Stewart Abramson Comments at 3; Thomas F. Kirby Comments; David Griffith Comments; Ghita & Stephan Strain Comments.

[627] *See, e.g.*, Brad Totten Comments at 3; DC Hunter Comments; James D. Gagnon Comments; Brian Klug Comments; Thomas Pechnik Comments at 4; NCL Comments at 3; EPIC Comments at 12; Verizon Reply Comments at 12.

up calls.[628] Some commenters stated that the inability to identify callers has led them to purchase other tools, such as the "telezapper," to try to stop unwanted solicitation calls.[629] Most commenters that addressed these issues support a prohibition against the blocking of caller ID information.[630] Several parties stated that the Commission should prohibit blocking independent of any caller ID mandate.[631] It was also suggested that the Commission could prohibit tampering with data or providing false data.[632]

175. Some industry members suggest that the transmission of caller ID information may not be technically possible in all circumstances.[633] They also maintain that a caller ID

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[628] *See, e.g.*, F. Jenny Holder Comments at 1; Thomas Callahan Comments; Michael C. Worsham Comments at 2; NCL Comments at 4; Gregory S. Reichenbach Comments; TOPUC Comments at 6-7; EPIC Comments at 12; Stewart Abramson Comments at 3; Thomas Pechnik Comments at 4; AGF Comments at 4; Joe Shields Comments at 7.

[629] OPC-DC Comments at 6; Janice G. Farkosh Comments; Leslie Price Comments; Josephine K. Presley Comments.

[630] *See, e.g.*, Verizon Comments at 18; PRC Comments at 5; NYSCPB Comments at 9; PUC of Ohio Comments at 19.

[631] OPC-DC Comments at 6; Owen O'Neill Comments at 1; TOPUC Comments at 3; Technion Comments at 6-7; Verizon Comments at 18; PUC of Ohio Comments at 19, NASUCA Comments at 3; Thomas Pechnik Comments at 4. *But see* NAA Comments at 17; Nextel Comments at 17-18; Comcast Comments at 14; Teleperformance Comments at 3; ABA Comments at 3 (should restrict caller ID blocking, but not require the transmission of caller ID).

[632] Stewart Abramson Comments at 3.

[633] Teleperformance Comments at 3; WorldCom Comments at 45; DMA Reply Comments at 30; Mastercard Comments at 7; Nextel Comments at 17-18; SER Comments at 2; Sprint Comments at 7; ECN Comments at 9 (asserting that telemarketers will provide caller ID when technologically feasible, and thus, the Commission need not adopt a caller ID requirement).

requirement could be costly for telemarketers.[634] One particular concern raised by parties opposed to a caller ID mandate is the technical feasibility of transmitting caller ID information when using private branch exchanges (PBX). WorldCom maintains that, in situations where telemarketers use a PBX that connects to their telephone company through typical T-1 trunks, Calling Party Number (CPN) cannot be transmitted.[635] WorldCom contends that Integrated Services Digital Network (ISDN) T-1 trunks *may* be capable of transmitting CPN, but that typical T-1 trunks do not have this capability.[636] DialAmerica notes that it has been delivering CPN for over two years using regular T-1 trunk groups provisioned by AT&T.[637] DialAmerica transmits an outgoing number which is captured by caller ID equipment. If a consumer chooses to call that number, the local exchange carrier (LEC) forwards the call to DialAmerica's customer service center.[638] DialAmerica asserts that ISDN T-1 trunks are available from all carriers and enable a user to control whether CPN is delivered and what telephone number is displayed.[639] WorldCom notes that even if we accept DialAmerica's assertion that ISDN trunks are universally available, carriers would have to upgrade network switches to

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[634] Teleperformance Comments at 3; WorldCom Comments at 45; DMA Reply Comments at 30; Nextel Comments at 18; SER Comments at 2; Sprint Comments at 7-8.

[635] WorldCom Reply Comments at 23.

[636] WorldCom Reply Comments at 23. We note that both typical T-1 and ISDN trunks contain 24 channels. ISDN trunks dedicate one channel specifically to data transmission, while typical T-1 lines dedicate all 24 channels to voice transmission.

[637] DialAmerica Comments, Attachment A at 1.

[638] DialAmerica Comments, Attachment A at 2.

[639] DialAmerica Comments, Attachment A at 1.

accommodate additional digital switch ports necessitated by telemarketers' shift to ISDN-PRI trunks.[640]

176. Telemarketers also raised technical concerns that the ability to transmit caller ID information is dependent on the deployment of Signaling System 7 (SS7).[641] They argue that SS7 is not nationally deployed and thus the capability to transmit caller ID is not available throughout the country.[642] Moreover, they maintain that Commission rules exempt PBX and Centrex systems from existing caller ID requirements because some of them cannot transmit CPN,[643] and not all carriers are able or permitted to transmit CPN, if they lack blocking capability.[644] The DMA and WorldCom expressed concern that regardless of whether the telemarketer is able to transmit CPN, consumers will expect it, and may incorrectly believe a company has violated the rules.[645]

177. Several parties argue that even if a telemarketer can transmit CPN information, how to transmit a number that is useful to consumers remains a challenge.[646] Comments were mixed on what information actually needed to be transmitted for purposes of caller ID. Several parties opined that the name of the telemarketing operator would be

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[640] WorldCom Reply Comments at 24.

[641] "Signaling System 7" (SS7) refers to a carrier to carrier out-of-band signaling network used for call routing, billing and management. *See* 47 C.F.R. § 64.1600(f).

[642] DMA Reply Comments at 30.

[643] *See* 47 C.F.R. § 64.1601(d).

[644] DMA Reply Comments at 29-30. *But see* NASUCA Comments at 9; Verizon Comments at 18 (indicating that caller ID is technically viable because CPN is transmitted to the LECs).

[645] DMA Reply Comments at 30; WorldCom Reply Comments at 26.

[646] *See, e.g.*, DMA Reply Comments at 30.

adequate identification.[647] Others asserted that the name of the company on whose behalf the call was being made should be provided.[648] Emergency Communications Network argued that a company's website information should be a permitted as a substitute for the name and phone number.[649]

178. The FTC's amended TSR mandates transmission of caller ID information and prohibits any seller or telemarketer from "failing to transmit or cause to be transmitted the telephone number, and when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call."[650] Under the FTC's rule, telemarketers may transmit any number associated with the telemarketer that allows the called consumer to identify the caller.[651] The FTC concluded that transmission of caller ID would provide increased accountability and was technically feasible at minimal costs to telemarketers. The DMA stated that it was concerned that technical issues were not adequately taken into account during the FTC's proceeding. The DMA requested that the FCC initiate a comprehensive review of the technical feasibility of caller ID.[652]

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[647] Jeff Mitchell Comments at 1; Martin C. Kaplan Comments at 2; City of New Orleans Comments at 8.

[648] Jeff Mitchell Comments at 1; NCL Comments at 4; Xpedite Systems Comments at 12; PRC Comments at 5.

[649] ECN Comments at 4.

[650] *FTC Order*, 68 Fed. Reg. at 4623.

[651] *FTC Order*, 68 Fed. Reg. at 4625.

[652] DMA Reply Comments at 30. The DMA notes that the FCC has the requisite experience to evaluate technical feasibility and a more comprehensive view of the larger issues of how a caller ID requirement might fit into the regulation of the communications network as a whole. *See* DMA Reply Comments at 29.

B. Discussion

179. The Commission has determined to require all sellers and telemarketers to transmit caller ID information, regardless of their calling systems. In addition, any person or entity engaging in telemarketing is prohibited from blocking the transmission of caller ID information. Caller ID information must include either ANI or CPN and, when available by the telemarketer's carrier, the name of the telemarketer. If the information required is not passed through to the consumer, through no fault of the telemarketer originating the call, then the telemarketer will not be held liable for failure to comply with the rules.[653] In such a circumstance, the telemarketer must provide clear and convincing evidence that the caller ID information could not be transmitted. However, the Commission concurs with the FTC that caller ID information can be transmitted cost effectively for the vast majority of calls made by telemarketers.[654] Caller ID allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again. Knowing the identity of the caller is also helpful to consumers who feel frightened or threatened by hang-up and "dead air" calls.[655] We disagree with those commenters who argue that caller ID information only benefits those consumers who subscribe to caller ID

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[653] *See* WorldCom Reply Comments at 26 (arguing that requiring caller ID could create an expectation in the minds of consumers that they should always receive the information and that such a regulation creates a situation where companies will be unfairly accused of breaking the law, and as a consequence, face undue litigation and harm to their reputations).

[654] *See* Nextel Further Comments at 16 (stating that most telemarketers are currently capable of transmitting caller ID using their existing equipment, and that the FCC should adopt an approach similar to the FTC's, if it chooses to regulate the transmission of caller ID for telemarketing calls).

[655] Cynthia Stichnoth Comments; Stewart Abramson Comments at 1.

services.[656] Consumers can also use the *69 feature to obtain caller ID information transmitted by a telemarketer.[657] Caller ID also should increase accountability and provide an important resource for the FCC and FTC in pursuing enforcement actions against TCPA and TSR violators.[658]

180. We conclude that while SS7 capability is not universally available, the vast majority of the United States has access to SS7 infrastructure. The SS7 network contains functionality to transmit both the CPN and the charge number.[659] Under the Commission's rules, with certain limited exceptions, common carriers using SS7 and offering or subscribing to any service based on SS7 functionality are required to transmit the CPN associated with an interstate call to connecting carriers.[660] Regardless of whether SS7 is available, a LEC at the originating end of a call must receive and be able to transmit the Automated Number Identification (ANI) to the connecting carrier,[661] as the ANI is the number

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[656] *See, e.g.*, Sprint Comments at 7-8, CBA Comments at 8.

[657] The *69 feature, available through many subscribers' telephone service providers, provides either: (1) information regarding the last incoming call, and the option to dial the caller back, or (2) the ability to return the last incoming call. Call information, however, would not be available for an incoming call, if the caller failed to transmit caller ID information or blocked such information.

[658] *See FTC Order*, 68 Fed. Reg. at 4623-24.

[659] "Charge number" is defined in 47 C.F.R. §64.1600(d) and refers to the delivery of the calling party's billing number by a local exchange carrier for billing or routing purposes, and to the subsequent delivery of such number to end users.

[660] *See* 47 C.F.R. §§ 64.1600, 64.1601.

[661] The term "ANI" refers to the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery to end users. *See* 47 C.F.R. § 64.1600(b). ANI is generally inferred by the switch. Each line termination on the telco switch corresponds to a different phone number for ANI.

transmitted through the network that identifies the calling party for billing purposes. Thus, we determine that telemarketers must ensure that either CPN or ANI is made available for all telemarketing calls in order to satisfy their caller ID requirements. Whenever possible, CPN is the preferred number and should be transmitted.[662] Consistent with the FTC's rules, CPN can include any number associated with the telemarketer or party on whose behalf the call is made, that allows the consumer to identify the caller.[663] This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, the number for the party on whose behalf the telemarketer is making the call, or the seller's customer service number. Any number supplied must permit an individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.[664]

181. As discussed above, some commenters state that it is not technically feasible for telemarketers to transmit caller ID information when using a PBX and typical T-1 trunks.[665] As noted by NASUCA, the Commission's rules exempt from the

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[662] Provision of Caller ID information does not obviate the requirement for a caller to verbally supply identification information during a call. *See* 47 C.F.R. § 64.1200(e)(iv).

[663] *See FTC Order*, 68 Fed. Reg. at 4623-28.

[664] This would mean 9:00 a.m. – 5:00 p.m. Monday through Friday. A seller or telemarketer calling on behalf of a seller must be able to record do-not-call requests at the number transmitted to consumers as caller ID. Therefore, if the person answering the calls at this number is not the sales representative who made the call or an employee of the seller or telemarketer who made the call, or if the telemarketer is using an automated system to answer the calls, the seller is nevertheless responsible for ensuring that any do-not-call request is recorded and the consumer's name, if provided, and telephone number are placed on the seller's do-not-call list at the time the request is made. *See also supra* note 492.

[665] *See supra* para. 175.

current caller ID rules, PBX and Centrex systems which lack the capability to pass CPN information. Regardless of whether a call is made using a typical T-1 trunk or an ISDN trunk, ANI is transmitted to the Local Exchange Carrier for billing purposes.[666] With both PBX and Centrex systems, the carrier can determine the billing number from the physical line being used to make a call, even if the billing number is not transmitted along that line to the carrier. We are cognizant of the fact that with PBX and Centrex systems, the billing number could be associated with multiple outgoing lines. Nevertheless, telemarketers using PBX or Centrex systems are required under the new rules not to block ANI, at a minimum, for caller ID purposes.

182. We recognize that ISDN technology is preferred, as it presents the opportunity to transmit both CPN and ANI. However, in situations where existing technology permits only the transmission of the ANI or charge number, then the ANI or charge number will satisfy the Commission's rules, provided it allows a consumer to make a do-not-call request during regular business hours.[667] By allowing transmission of ANI or charge number to satisfy the caller ID requirement, we believe that carriers need not incur significant costs to upgrade T-1 and ISDN switches.[668] For these same reasons, we also believe that mandating caller ID will not create a competitive advantage towards particular carriers.[669] As

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[666] *See* Telcordia Notes on the Networks – Notes Design and Configuration, Telcordia Technologies Special Report SR-2275, Issue 4, October 2000, pp. 4-30. *See also, Administration of the North American Numbering Plan, Carrier Identification Codes (CICs)*, CC Docket No. 92-237, Second Report and Order, 12 FCC Rcd 8024 (1997).

[667] We note that a telemarketer using a service that prevents the transmission of the required caller ID information will be in violation of the Commission's caller ID rules.

[668] *See* WorldCom Reply Comments at 26.

[669] *See, e.g.*, Discover Comments at 7; DMA Reply Comments at 30.

typical T-1 technology is upgraded to ISDN technology, we expect that telemarketers will increasingly be able to transmit the preferred CPN instead of ANI or charge number.

183. Finally, the record strongly supports a prohibition on blocking caller ID information.[670] Both NCL and NASUCA state that there is no valid reason why a telemarketer should be allowed to intentionally block the transmission of caller ID.[671] We conclude that the caller ID requirements for commercial telephone solicitation calls do not implicate the privacy concerns associated with blocking capability for individuals.[672] We recognize that absent a prohibition on blocking, a party could transmit CPN in accordance with the new rules and simultaneously transmit a request to block transmission of caller ID information. Thus, the Commission has determined to prohibit any request by a telemarketer to block caller ID information or ANI.

184. As explained above, the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing calls. Therefore, the Commission has determined not to extend the caller ID requirements to tax-exempt nonprofit organizations. However, the caller ID rules will apply to all other companies engaged in telemarketing, and the existence of an established business relationship between the telemarketer and the consumer shall not be an exception to these rules. For all covered entities, the effective date of the caller ID requirements will be January 29, 2004.[673] This will provide

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[670] *See, e.g.,* TOPUC Comments at 3; Verizon Comments at 18; Owen O'Neill Comments at 1; Rob McNeal Comments; Jeff Mitchell Comments at 1.

[671] NASUCA Comments at 8-9; NCL Comments at 3.

[672] *See* 47 C.F.R. § 64.1601(b).

[673] *See* new rule at 47 C.F.R. § 64.1601(e). *See also* FTC Further Comments (explaining that the goals of regulatory consistency will be promoted if the FCC adopts caller ID requirements analogous to Amended TSR 16 C.F.R. § 310.4(a)(7)).

telemarketers a reasonable period of time to obtain or update any equipment or systems to enable them to transmit caller ID information. We decline to extend the effective date beyond January 29, 2004, which is consistent with the date on which telemarketers are required to comply with the FTC's caller ID provision.[674]

XIII UNSOLICITED FACSIMILE ADVERTISEMENTS

A. Background

185. The TCPA prohibits the use of any telephone facsimile machine, computer or other device to send an "unsolicited advertisement" to a telephone facsimile machine.[675] An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[676] The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[677] In the *1992 TCPA Order*,

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[674] *See* Notices of *Ex Parte Presentations* from WorldCom to FCC, filed May 23, 2003 and June 16, 2003 (advocating a 13-month implementation period for the caller ID rules). *See also* FTC Further Comments (explaining that the goals of regulatory consistency will be promoted if the FCC adopts caller ID requirements analogous to Amended TSR 16 C.F.R. § 310.4(a)(7)).

[675] 47 U.S.C. § 227(b)(1)(C). The United States Court of Appeals for the Eighth Circuit recently upheld the TCPA's provision on unsolicited faxes as satisfying the constitutional test for regulation of commercial speech. *See Missouri ex rel Nixon v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003) *(petition for rehearing pending).*

[676] 47 C.F.R. § 64.1200(f)(5).

[677] Specifically, the TCPA provides that the facsimile include "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the

the Commission stated that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition."[678] It noted, however, that facsimile transmission from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.[679] The Commission sought comment on the effectiveness of these regulations and on any developing technologies, such as computerized fax servers, that might warrant revisiting the rules on unsolicited faxes.[680] We specifically asked about the need to clarify what constitutes prior express invitation or permission for purposes of sending an unsolicited fax.[681]

186. The record indicates that some consumers feel "besieged" by unsolicited faxes;[682] others explain that advertisers continue to send faxes despite asking to be removed from senders' fax lists.[683] Consumers emphasize that the burden of receiving unsolicited faxes is not just limited to the cost of paper and toner, but includes the time spent

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message and the telephone number of the sending machine or of such business, other entity, or individual." 47 U.S.C. § 227(d)(1)(B). The Commission determined that the sender of a facsimile message is the creator of the content of the message. *See 1997 Reconsideration Order*, 12 FCC Rcd at 4613, para. 6.

[678] *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n. 87.

[679] *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n. 87.

[680] *2002 Notice*, 17 FCC Rcd at 17482, para. 37

[681] *2002 Notice*, 17 FCC Rcd at 17482-83, para. 38. The Commission sought comment specifically on the Commission's determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions. *See 2002 Notice*, 17 FCC Rcd at 17483, para. 39.

[682] Chris Hernandez Comments; Damien Blevins Comments; Peter LeCody Comments; Joe Shields Comments at 6; Mathemaesthetics Comments at 2.

[683] Anthony Oppenheim Comments; W. Allen Wilkens, Jr. Comments.

reading and disposing of faxes, the time the machine is printing an advertisement and is not operational for other purposes, and the intrusiveness of faxes transmitted at inconvenient times, including in the middle of the night.[684] Some of the consumer advocates maintain that the current rules are ineffective[685] and urge the Commission to take tougher measures to stop unwanted faxes by stricter enforcement measures,[686] including higher penalties. A few home-based businesses and other companies maintain that facsimile advertisements interfere with receipt of faxes connected to their own business, and that the time spent collecting and sorting these faxes increases their labor costs.[687] Industry members maintain that faxing is a cost-effective way to reach customers,[688] and that the current exemption for established

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[684] J. Greg Coontz Comments at 15-17.

[685] NCL Comments at 6.

[686] Dennis C. Brown Comments at 13; City of New Orleans Comments at 11.

[687] Jim Carter Comments; JC Homola Comments; Autoflex Comments at 1-2; Rob McNeal Comments (unsolicited faxes costs company tens of thousands of dollars each year in materials and employee time); *see also* NCL Comments at 6 ("[P]eople who work out of their homes are especially harmed by unsolicited faxes, which use up their paper and toner and tie up their machines."); Mathemaesthetics Reply Comments at 7 ("[U]nsolicited [fax] ads caused my business fax machine to become prematurely empty, which rendered *wholly useless* the equipment my small business crucially depends on for its revenue. When a customer of mine a short time later attempted to fax a purchase order for over $3,000 worth of my company's product, my empty fax machine was not able to capture this transaction for a significant period of time. . . " (emphasis in original)).

[688] ABM Comments at 4 (Members have found that targeted fax communication is cost-effective way to seek renewal "request" forms from existing subscribers, and to communicate with subscribers about industry trade shows.).

business relationships works well,[689] particularly for small businesses for whom faxing is a cheaper way to advertise.[690]

B. Discussion

1. Prior Express Invitation or Permission

187. The Commission has determined that the TCPA requires a person or entity to obtain the prior express invitation or permission of the recipient before transmitting an unsolicited fax advertisement. This *express* invitation or permission must be in writing and include the recipient's signature.[691] The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company to which permission is given, and provide the individual or business's fax number to which faxes may be sent.

188. *Established Business Relationship.* The TCPA does not act as a total ban on fax advertising. Persons and businesses that wish to advertise using faxes may, under the TCPA, do so with the express permission of the recipients. In the *2002 Notice*, we sought comment on whether an established business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisements.[692] The majority of industry commenters support the finding that facsimile transmissions from persons or entities that have an established business relationship with the recipient can be deemed to be invited or

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[689] MPA Comments at 22; Nextel Comments at 25; NADA Comments at 2; Scholastic Comments at 13; Reed Comments at 2-3.

[690] NADA Comments at 2; NFIB Comments at 3.

[691] The term "signature" in the amended rule shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law. *See, e.g.*, Cendant Comments at 6.

[692] *2002 Notice*, 17 FCC Rcd at 17483, para. 39.

permitted by the recipient.[693] These commenters maintain that eliminating the EBR exemption for facsimile advertisements would interfere with ongoing business relationships, raise business costs, and limit the flow of valuable information to consumers.[694] They urge the Commission to amend the rules to expressly provide for the EBR exemption.[695] Conversely, the majority of consumer advocates argue that the TCPA requires companies to obtain express permission from consumers—even their existing customers—before transmitting a fax to a consumer.[696] Some consumer advocates maintain that the Commission erred in its 1992 determination that a consumer, by virtue of an established business relationship, has given his or her express invitation or permission to receive faxes from that company.[697] They urge the Commis-

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[693] ABM Comments at 9; DIRECTV Comments at 9-19; Hunton & Williams Comments at 5-6; Lorman Further Comments at 7 (noting that parties with an established business relationship expect to be in communications with companies with which they do business, and that any company that transmits ads by fax should be required to maintain a company-specific do-not-fax list).

[694] Nextel Reply Comments at 6.

[695] *See* Xpedite Reply Comments at 6; ABM Comments at 4-5; Nextel Comments at 25; DIRECTV Comments at 9-10; Lorman Further Comments at 8.

[696] Biggerstaff Reply Comments at 22 (noting that express permission can easily be requested from existing customers, as paperwork is exchanged between merchants and their customers regularly); NAAG Comments at 31 (stating that treating express consent on a case-by-case basis can be costly and time-consuming, as consent is the main defense asserted by fax advertisers. NAAG suggests that the Commission adopt a concrete definition of "express," meaning definite, explicit or direct, and not left to inference).

[697] NAAG Comments at 31-32 (arguing that creating an established business relationship exception runs contrary to the clear wording of the statute. "The TCPA defines 'unsolicited advertisement' as an advertisement sent to a person 'without that person's prior express invitation or permission.' A business relationship exemption would rely on *implied*

sion to eliminate the EBR exemption, noting that Congress initially included in the TCPA an EBR exemption for faxes, but removed it from the final version of the statute.[698]

189. We now reverse our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. As of the effective date of these rules, the EBR will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements.[699] The record in this proceeding reveals consumers and businesses receive faxes they believe they have neither solicited nor given their permission to receive.

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invitation or permission which is contrary to the clear wording of the statute." (emphasis in original; footnotes omitted)); Mark R. Lee Comments; Biggerstaff Comments at 3; John Holcomb Comments at 4; Kondos & Kondos Comments at 3-4; Marc A. Wites Comments; Wayne G. Strang Comments at 12; Michael C. Worsham Comments at 13; Wayne G. Strang Reply Comments at 16. *But see* NYSCPB Comments at 18 (recommends retaining the EBR as permission to receive faxes).

[698] *See* Kondos & Kondos Comments at 1-2 and Exhibit A (noting that three versions of the House predecessor bill to the TCPA included an EBR exemption for unsolicited fax ads. "Not only is an EBR not a defense to unsolicited fax advertising under the TCPA, the U.S. Congress specifically included such a defense in numerous predecessor TCPA bills and then excluded it in the law which overwhelmingly passed in 1991." Kondos & Kondos Comments at 2); John Holcomb Comments at 4; Biggerstaff Comments at 3.

[699] *See 1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n. 87 (finding that facsimile transmissions from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient). *See also* 47 C.F.R. 64.1200(f)(4) for the definition of an "established business relationship." We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules.

Recipients of these faxed advertisements assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions.[700]

190. The legislative history indicates that one of Congress' primary concerns was to protect the public from bearing the costs of unwanted advertising. Certain practices were treated differently because they impose costs on consumers. For example, under the TCPA, calls to wireless phones and numbers for which the called party is charged are prohibited in the absence of an emergency or without the prior express consent of the called party.[701] Because of the cost shifting involved with fax advertising, Congress similarly prohibited unsolicited faxes without the prior express permission of the recipient.[702] Unlike the do-not-call list for telemarketing calls, Congress provided no mechanism for opting out of unwanted facsimile advertisements. Such an opt-out list would require the recipient to possibly bear the cost of the initial facsimile and inappropriately place the burden on the recipient to contact the sender and request inclusion on a "do-not-fax" list.[703]

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[700] NCL Comments at 6; Michael J. Blitch Comments at 7; Autoflex Comments at 1-2.

[701] *See* 47 U.S.C. § 227(b)(1).

[702] 47 U.S.C. §§ 227(b)(1)(C) and (a)(4).

[703] *See, e.g.*, Blocklist.com Comments (operates a national do-not-fax list); Davide Di Labio Comments (should be a national fax list for those opposed to faxes); William B. Hayes Comments (no-fax lists are an alternative solution); Paul Aratow Comments (do-not-fax lists do not work); W. Allen Wilkins Comments (after responding to a "remove your fax number," receives more faxes).

191. Instead, Congress determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission to do so before transmitting any faxes to them.[704] Advertisers may obtain consent for their faxes through such means as direct mail, websites, and interaction with customers in their stores. Under the new rules, the permission to send fax advertisements must be provided in writing, include the recipient's signature and facsimile number, and cannot be in the form of a "negative option."[705] For example, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company. Such statement, if accompanied by the recipient's signature, will constitute the necessary prior express permission to send facsimile advertisements to that individual or business. We believe that even small businesses may easily obtain permission from existing customers who agree to receive faxed advertising, when customers patronize their stores or provide their contact information. The Commission believes that given the cost shifting and interference caused by unsolicited faxes, the interest in protecting those who would otherwise be forced to bear the burdens of unwanted faxes outweighs the interests of companies that wish to advertise via fax.

192. *Membership in a Trade Association.* In its *1995 Reconsideration Order*, the Commission determined that mere distribution or publication of a telephone facsimile

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[704] *See* 47 U.S.C. §§ 227(b)(1)(C) and (a)(4).

[705] A facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes, would constitute a "negative option." This option (in which the sender presumes consent unless advised otherwise) would impose costs on facsimile recipients unless or until the recipient were able to ask that such transmissions be stopped.

number is not the equivalent of prior express permission to receive faxed advertisements.[706] The Commission also found that given the variety of circumstances in which such numbers may be distributed (business cards, advertisements, directory listings, trade journals, or by membership in an association), it was appropriate to treat the issue of consent in any complaint regarding unsolicited facsimile advertisements on a case-by-case basis.[707] In the *2002 Notice*, we sought comment specifically on the issue of membership in a trade association or similar group and asked whether publication of one's fax number in an organization's directory constitutes an invitation or permission to receive an unsolicited fax.[708] The American Business Media argued that those willing to make fax numbers available in directories released to the public do so with an expectation that such fax numbers will be used for advertising.[709] Consumer advocates, however, contend that publicly listing a fax number is not a broad invitation to send commercial faxes.[710] TOPUC asserted that businesses often publish their fax numbers for the convenience of their customers, clients and other trade association members, not for the benefit of telemarketers.[711]

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[706] *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09, para. 37.

[707] *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09, para. 37.

[708] *2002 Notice*, 17 FCC Rcd at 17482-83, para. 38.

[709] ABM Comments at 8; *see also* Brunswick Comments at 8-10; DIRECTV Comments at 11 (generally, publication of a fax number should constitute permission, but consumers should be able to control the circumstances under which they will receive faxes. For example, a trade association could note in its directory that faxes are not to be used for advertising purposes).

[710] *See, e.g.*, NCL Comments at 6; NAAG Comments at 31; TOPUC Comments at 6; John Holcomb Comments at 4.

[711] TOPUC Comments at 6; *see also* Mathemaesthetics Reply Comments at 7 (operators of a trade show ignored request not to use fax number for advertising and began transmitting multi-page fax ads for

193. The Commission agrees that fax numbers are published and distributed for a variety of reasons, all of which are usually connected to the fax machine owner's business or other personal and private interests. The record shows that they are not distributed for other companies' advertising purposes. Thus, a company wishing to fax ads to consumers whose numbers are listed in a trade publication or directory must first obtain the express permission of those consumers. Express permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements. We believe the burden on companies to obtain express permission is warranted when balanced against the need to protect consumers and businesses from bearing the advertising costs of those companies. Finally, the Commission affirms that facsimile requests for permission to transmit faxed ads, including toll-free opt-out numbers, impose unacceptable costs on the recipients. This kind of "negative option" is contrary to the statutory requirement for prior express permission or invitation.[712]

2. Fax Broadcasters

194. The Commission explained in the *2002 Notice* that some fax broadcasters, who transmit other entities' advertisements to a large number of telephone facsimile machines for a fee, maintain lists of facsimile numbers that they use to direct their clients' advertisements.[713] We noted that this practice, among others, indicates a fax broadcaster's

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services my business has no interest in). *But see* NADA Comments at 3 (in deciding to become a member of a trade association, the member voluntarily seeks the benefit of the association's services).

[712] *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09, para. 37; *see also* Hunton & Williams Comments at 7 (recommends at opt-out mechanism for unsolicited faxes).

[713] *2002 Notice*, 17 FCC Rcd at 17483-84, para. 40.

close involvement in sending unlawful fax advertisements and may subject such entities to enforcement action under the TCPA and our existing rules. We then sought comment on whether the Commission should address specifically in the rules the activities of fax broadcasters.[714] Companies and organizations whose members hire fax broadcasters to transmit their messages argue that the fax broadcaster should be liable for violations of the TCPA's faxing prohibition.[715] AIADA maintains this should be the case, even if the fax broadcaster uses the list of fax numbers provided by the company doing the advertising.[716] Nextel argues that liability ought to lie with the party controlling the destination of the fax; that fax broadcasters who actively compile and market databases of fax numbers are the major perpetrators of TCPA fax violations.[717] Nextel specifically urges the Commission to find that companies whose products are advertised by independent retailers should not be liable for TCPA violations when they have no knowledge of such activities.[718] Fax broadcasters disagree that they should be liable for unlawful faxes, maintaining that many of them do not exercise any editorial control or discretion over the content of the messages,[719] and do not provide the list of fax numbers to

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[714] *2002 Notice* , 17 FCC Rcd at 17483-84, para. 40.

[715] AIADA Comments at 2; Nextel Comments at 40.

[716] AIADA Comments at 2.

[717] Nextel Comments at 38; *see also* NAAG Comments at 32 (stating that fax broadcasters that maintain their own databases of fax numbers are the subject of the vast majority of consumer complaints and state enforcement actions, and that fax broadcasters who determine the content of the advertisement or its destination should be held liable for unsolicited faxes).

[718] Nextel Comments at 25, 38-40; *see also* DIRECTV Comments at 3, 9 (asking whether DIRECTV or its independent contractors have the established business relationship with a consumer).

[719] Xpedite Comments at 5-7; Globecomm Comments at 4-5; ADVAL Reply Comments at 3 (fax broadcasters never see the list of recipients or

which the ads are transmitted.[720] Many industry as well as consumer commenters agree that only those fax broadcasters who are closely involved in the transmission of the fax should be subject to liability.[721] Reed asserts that liability should rest with the entity on whose behalf a fax is sent; that fax broadcasters are not in a position to know firsthand whether, for example, an established business relationship exists between the company and consumer.[722]

195. The Commission's rulings clearly indicate that a fax broadcaster's exemption from liability is based on the type of activities it undertakes, and only exists "[i]n the absence of 'a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions.' "[723] The Commission believes that, based on the record and our own enforcement experience, addressing the activities of fax broadcasters will better inform both consumers and businesses about the prohibition on unsolicited fax advertising. The Commission has determined to amend the rules to explicitly state that a fax broadcaster will be liable for an unsolicited fax if there is a high degree of involvement or actual notice on the part of the broadcaster. The new rules provide that if the fax broadcaster supplies the fax numbers used to transmit the advertisement, the fax broadcaster will be liable for any unsolicited advertisement faxed to consumers and businesses without their prior express invitation or permission. We agree, however, that if the company whose

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the faxed document, which is often uploaded directly through the Internet); Xpedite Reply Comments at 3, 8.

[720] ADVAL Reply Comments at 3; Xpedite Reply Comments at 3.

[721] Xpedite Comments at 3-4; NAAG Comments at 32-33; NCL Comments at 6; ADVAL Comments at 3 ("Fax carriers should not be penalized for traffic sent by third parties.").

[722] Reed Comments at 6.

[723] *1992 TCPA Order*, 7 FCC Rcd at 8780, para. 54 (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987)).

products are advertised has supplied the list of fax numbers, that company is in the best position to ensure that recipients have consented to receive the faxes and should be liable for violations of the prohibition. Therefore, the fax broadcaster will not be responsible for the ads, in the absence of any other close involvement, such as determining the content of the faxed message.[724] In such circumstances where both the fax broadcaster and advertiser demonstrate a high degree of involvement, they may be held jointly and severally liable for violations of the unsolicited facsimile provisions. In adopting this rule, the Commission focuses on the nature of an entity's activity rather than on any label that the entity may claim. We believe the rule will better inform the business community about the prohibition on unsolicited fax advertising and the liability that attaches to such faxing. And, it will better serve consumers who are often confused about which party is responsible for unlawful fax advertising. For the same reasons, the new rules define "facsimile broadcaster" to mean a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.[725]

196. Some commenters ask the Commission to clarify the extent of common carriers' liability for the transmission of unsolicited faxes.[726] Cox specifically urges the Commission to distinguish the obligations of fax broadcasters from "traditional common carriers."[727] As noted above, the Commission has stated that "[i]n the absence of 'a high degree of involvement or actual notice of an illegal use and failure to

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[724] A high degree of involvement might be demonstrated by a fax broadcaster's role in reviewing and assessing the content of a facsimile message.

[725] *See* 47 C.F.R. § 64.1200(f)(4).

[726] Cox Comments at 12-19.

[727] Cox Comments at 13.

take steps to prevent such transmissions,' common carriers will not be held liable for the transmission of a prohibited facsimile message."[728] We reiterate here that if a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that common carrier will not be liable for the facsimile.

197. Nextel urges the Commission to clarify that section 217 of the Communications Act does not impose a higher level of liability on common carriers than on other entities for violations of the TCPA.[729] Section 217 provides that " [i]n construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."[730] The Commission declines to address the scope of section 217 in this rulemaking, which was not raised in the *2002 Notice* or in subsequent notices in this proceeding.

3. Fax Servers

198. The TCPA makes it unlawful for any person to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.[731] The TCPA defines the term "telephone facsimile machine" to mean "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular

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[728] *1992 TCPA Order*, 7 FCC Rcd at 8780, para. 54 (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987)).

[729] Nextel Comments at 40-41.

[730] 47 U.S.C. § 217.

[731] 47 U.S.C. § 227(b)(1)(C).

telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper."[732] The Commission sought comment on any developing technologies, such as computerized fax servers, that might warrant revisiting these rules.[733]

199. Commenters who addressed this issue were divided on whether fax servers should be subject to the unsolicited facsimile provisions. Some industry representatives urged the Commission to clarify that the TCPA does not prohibit the transmission of unsolicited fax advertisements to fax servers and personal computers because these transmissions are not sent to a "telephone facsimile machine," as defined in the statute.[734] Nextel maintains that such faxes do not implicate the harms Congress sought to redress in the TCPA, as they are not reduced to paper and can be deleted from one's inbox without being opened or examined.[735] Other commenters disagree, noting that there are other costs associated with faxes sent to computers and fax servers.[736] They note that the TPCA only requires that the equipment have the *capacity* to transcribe text or messages onto paper,[737] and that computer fax servers and personal computers have that capacity.

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[732] 47 U.S.C. § 227(a)(2); this definition was incorporated in § 64.1200(f)(2) of the Commission's rules.

[733] *2002 Notice*, 17 FCC Rcd at 17482, para. 37.

[734] *See* Nextel Comments at 31-32.

[735] Nextel Reply Comments at 4-5.

[736] Michael C. Worsham Comments at 20; James Suggs Comments at 1. Commenters also note that some commercial facsimile services transmit faxes to the recipients as email attachments. We emphasize that any rules the Commission adopts with respect to unsolicited facsimile advertisements would not extend to facsimile messages transmitted as email over the Internet. *See* definition of telephone facsimile machine at 47 U.S.C. § 227(a)(2).

[737] Autoflex Comments at 2; J. Greg Coontz Reply Comments at 11-15, 16-17.

200. We conclude that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes. However, we clarify that the prohibition does not extend to facsimile messages sent as email over the Internet. The record confirms that a conventional stand-alone telephone facsimile machine is just one device used for this purpose; that developing technologies permit one to send and receive facsimile messages in a myriad of ways. Today, a modem attached to a personal computer allows one to transmit and receive electronic documents as faxes. "Fax servers" enable multiple desktops to send and receive faxes from the same or shared telephony lines.[738]

201. The TCPA's definition of "telephone facsimile machine" broadly applies to any equipment that has the capacity to send or receive text or images. The purpose of the requirement that a "telephone facsimile machine" have the "capacity to transcribe text or images" is to ensure that the prohibition on unsolicited faxing not be circumvented. Congress could not have intended to allow easy circumvention of its prohibition when faxes are (intentionally or not) transmitted to personal computers and fax servers, rather than to traditional stand-alone facsimile machines. As the House Report accompanying the TCPA explained, "facsimile machines are designed to accept, process and print all messages which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will

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[738] *See* Kauffman Comments at 3. Although fax boards alone do not have the capability to transcribe text onto or from paper, the Commission nevertheless determined that fax modem boards, which enable personal computers to transmit messages to or receive messages from conventional facsimile machines or other computer fax boards, are the functional equivalent of telephone facsimile machines. *See 1995 Reconsideration Order*, 10 FCC Rcd at 12404-06, paras. 28-30.

be received and printed by the recipient's machine."[739] However, Congress also took account of the "interference, interruptions, and expense" resulting from junk faxes, emphasizing in the same Report that "[i]n addition to the costs associated with the fax advertisements, when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications."[740]

202. Facsimile messages sent to a computer or fax server may shift the advertising costs of paper and toner to the recipient, if they are printed. They may also tie up lines and printers so that the recipients' requested faxes are not timely received.[741] Such faxes may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related to their company's business. Finally, because a sender of a facsimile message has no way to determine whether it is being sent to a number associated with a stand-alone fax machine or to one associated with a personal computer or fax server, it would make little sense to apply different rules based on the device that ultimately received it.

4. Identification Requirements

203. The TCPA and Commission rules require that any message sent via a telephone facsimile machine contain the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business,

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[739] H.R. REP. NO. 102-317 at 10 (1991).

[740] H.R. REP. NO. 102-317 at 25 (1991).

[741] *See Covington & Burling v. International Marketing & Research, Inc. et al.*, No. 01-0004360 (D.C. Sup. Ct. (April 16, 2003) (finding a fax broadcaster liable under the TCPA for transmitting unsolicited fax advertisements to a law firm's fax server).

other entity, or individual.[742] In the *2002 Notice*, the Commission asked whether these rules have been effective at protecting consumers' rights to enforce the TCPA.[743] The Commission determined in its *1997 Reconsideration Order* that a facsimile broadcast service must ensure that the identifying information of the entity on whose behalf the provider sent messages appear on facsimile messages. In its discussion, the Commission clarified that the sender of a facsimile message is the creator of the content of the message, finding that Section 227(d)(1) of the TCPA mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message, and not the entity that transmits the message.[744] The Commission believes that if a fax broadcaster is responsible for the content of the message or for determining the destination of the message (*i.e.*, supplying the list of facsimile numbers to which the faxes are sent), it should be identified on the facsimile, along with the entity whose products are advertised.[745] Therefore, we amend the rules to require any fax broadcaster that demonstrates a high degree of involvement in the transmission of such facsimile message to be identified on the facsimile, along with the identification of the sender.[746] This will permit consumers to hold fax broadcasters accountable for unlawful fax advertisements when there is a high degree of involvement on the

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[742] 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68.318(d).

[743] *2002 Notice*, 17 FCC Rcd at 17483-84, paras. 37 and 40.

[744] *1997 Reconsideration Order*, 12 FCC Rcd at 4612-13, para. 6.

[745] *See* NAAG Comments at 32-33 (stating that only requiring the advertiser's identify has been a hindrance in enforcing the TCPA. It has been the states' experience that fax broadcasters, who maintain their own databases and send others' advertisements to these fax numbers, frequently omit their identifying information as the sender in order to avoid detection and enforcement action.).

[746] *See* amended rule at 47 C.F.R. § 68.318(d).

part of the fax broadcaster.[747] Commenters suggested the Commission clarify what constitutes an adequate identification header.[748] Consistent with our amended identification rules for telemarketing calls, senders of fax advertisements will be required under the new rules to use the name under which they are officially registered to conduct business.[749] Use of a "d/b/a" ("doing business as") or other more widely recognized name is permissible; however, the official identification of the business, as filed with state corporate registration offices or comparable regulatory entities, must be included, at a minimum.

XIV. PRIVATE RIGHT OF ACTION

A. Background

204. The TCPA is a unique statute in that it provides consumers with two private rights of action for violations of the TCPA rules. One provision permits a consumer to file suit immediately in state court if a caller violates the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements.[750] A separate private right of action permits a consumer to file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the

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[747] *See supra* discussion, paras. 194-195.

[748] Michael C. Worsham Comments at 11-12; NCL Comments at 6; Michael J. Blitch Comments at 7 (both seller and fax broadcaster should be identified); NAAG at 33 (should require identifying information of fax broadcaster). *But see* Xpedite Reply Comments at 8 (requiring a fax broadcaster's identifying information could confuse consumers as to who created the message. Uninvolved fax broadcasters should not be required to identify themselves on faxes.).

[749] *See supra* discussion on identification requirements for telemarketers, para. 144.

[750] 47 U.S.C. § 227(b)(3).

guidelines for making telephone solicitations.[751] Based on inquiries received about the private right of action, the Commission asked whether we should clarify whether a consumer may file suit after receiving one call from a telemarketer who, for example, fails to properly identify himself or makes a call outside the time of day restrictions.[752]

205. Industry commenters argue that the statutory language is clear; that only a person who has received more than one telephone call that violates the telephone solicitation rules within any 12-month period may file suit under the TCPA's private right of action.[753] Consumers and consumer advocates were split on the issue. Some maintained that a consumer should be permitted to pursue a private right of action for a telemarketer's first offense;[754] others acknowledged that the statute does not permit a cause of action for the first time a telemarketer violates the telephone solicitation rules.[755] Several industry commenters point out that they have been named as defendants in class action lawsuits under the TCPA in state courts.[756] They urge the Commission to determine that the TCPA's private right of action does not contemplate or

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[751] 47 U.S.C. § 227(c)(5).

[752] *2002 Notice*, 17 FCC Rcd at 17486-87, para. 47.

[753] Mastercard Comments at 7; BMO Financial Comments at 4; Bank of America Comments at 6; DialAmerica Comments at 14; AT&T Wireless Reply Comments at 27-28.

[754] Martin C. Kaplan Comments at 2 (acknowledging that "[u]p to one call per year is permitted . . . should be amended to total prohibition"); April Jordon Comments at 2; Wayne G. Strang Reply Comments at 16; NCL Comments at 7.

[755] NYSCPB Comments at 19; Michael C. Worsham Comments at 15 (Commission should clarify that once threshold of two calls received within one year is met all violations in any calls are actionable).

[756] *See* DIRECTV Comments at 3-4; Nextel Comments at 39.

permit class action lawsuits.[757] Some consumer commenters and plaintiffs' attorneys who have filed class action suits argue that foreclosing class actions would severely handicap the effectiveness of the TCPA and consumers' ability to enforce its provisions. They also contend that the FCC is not authorized to interfere with state courts' certification of class actions.[758]

B. Discussion

206. The Commission declines to make any determination about the specific contours of the TCPA's private right of action. Congress provided consumers with a private right of action, "if otherwise permitted by the laws or rules of court of a State."[759] This language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those courts' rules. The Commission believes it is for Congress, not the Commission, to either clarify or limit this right of action.

XV. INFORMAL COMPLAINT RULES

207. In the *2002 Notice*, the Commission noted that it had released another Notice of Proposed Rulemaking in February of 2002, seeking comment on whether to extend the informal complaint rules to entities other than common carriers.[760] We

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[757] *See, e.g.*, AIA Comments at 2; AIADA Comments at 2; Kauffman Comments at 8; DIRECTV Reply Comments at 7; ABM Comments at 2.

[758] *See* Hershovitz Reply Comments at 1, 8-9; Wayne G. Strang Reply Comments at 4; *see also* City of New Orleans Comments at 11; Joe Shields Reply Comments at 9.

[759] 47 U.S.C. § 227(c)(5).

[760] *2002 Notice*, 17 FCC Rcd at 17486-87, para. 47. *See generally Establishment of Rules Governing Procedures to Be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission; Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures to Be Followed When Informal Complaints Are Filed Against Common Carriers; 2000 Biennial*

sought comment in this proceeding on whether the Commission should amend these informal complaint rules to apply to telemarketers. We will review this issue as part of the Informal Complaints proceeding. All comments filed in this proceeding that address the applicability of the informal complaint rules to telemarketers will be incorporated into CI Docket No. 02-32.

XVI. TIME OF DAY RESTRICTIONS

208. Commission rules restrict telephone solicitations between the hours of 8:00 a.m. and 9:00 p.m. local time at the called party's location.[761] As part of our review of the TCPA rules, we sought comment on how effective these time restrictions have been at limiting objectionable solicitation calls.[762] The Commission also asked whether more restrictive calling times could work in conjunction with a national registry to better protect consumers from telephone solicitations to which they object.

209. Industry members that commented on the calling time restrictions unanimously asserted that the current calling times should be retained.[763] Some explained that any restrictions on calls made during the early evening hours, in particular, would interfere with telemarketers' ability to reach their customers.[764] Consumers, on the other hand, urged the Commission to adopt tighter restrictions on the times that telemarketers may call them. Some object to calls at the end

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Review, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CI Docket No. 02-32, CC Docket Nos. 94-93, 00-175, 17 FCC Rcd 3919 (2002).

[761] 47 C.F.R. § 64.1200(e)(1).

[762] *2002 Notice*, 17 FCC Rcd at 17481-82, para. 36.

[763] *See, e.g.*, ATA Comments at 105; BMO Financial Comments at 5; HFS Comments at 9; Technion Comments at 7; AT&T Wireless Comments at 28.

[764] Teleperformance Comments at 2; ATA Comments at 106.

of the day and during the dinner hour;[765] others prefer that telemarketers not be able to begin calling until later in the morning.[766] Some suggest the calling times should parallel local noise ordinances.[767] EPIC advocated allowing consumers to specify the hours they wish to receive calls.[768]

210. The Commission declines to revise the restrictions on calling times. Instead, we retain the current calling times, which are consistent with the FTC's rules.[769] We believe the current calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry in their efforts to conduct legitimate telemarketing. We also believe that Commission rules that diverge from the FTC's calling restrictions will lead to confusion for consumers. Moreover, consumers who want to block unwanted calls during certain times will now have the option of placing their telephone numbers on the national do-not-call registry. They will have the additional option of giving express verifiable authorization to only those companies they wish to hear from. The Commission declines at this time to require companies to adhere to consumers' calling preferences, including "acceptable" calling times.[770] We believe that the costs of monitoring calling times for individual consumers

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[765] *See, e.g.*, Melva L. Taylor Comments at 1; Michael C. Worsham Comments at 11; Robert Jaglowski Comments; Linda M. Deakl Comments; Richard M. Bryant Comments.

[766] J. Melville Capps Comments; Mandy Burkart Comments; Jeff Bryson Comments; John Shaw Comments at 7 (due to the number of nighttime workers, time of day restrictions should begin at 9 am).

[767] PUC of Ohio Comments at 22-23; James Wood Comments.

[768] EPIC Comments at 13.

[769] *See* 16 C.F.R. § 310.4(c); *see also* FTC Further Comments at 47-50 (stating that the FCC should retain its existing calling time restrictions and maintain the consistency that both agencies have sought on this issue).

[770] The Commission encourages any seller or telemarketer to comply with consumers' requests not to be called during certain times of the day.

could be substantial for many companies, particularly small businesses. The Commission may revisit this option in the future.

XVII. ENFORCEMENT PRIORITIES

211. TCPA enforcement has been a Commission priority over the past several years,[771] and we intend that it remain so. In guiding our future enforcement plans, we recognize that the FTC's recent rule changes expand that agency's regulation of telemarketing activities and require coordination to ensure consistent and non-redundant federal enforcement in this area. Most notably, the FTC's adoption of a nation-wide do-not-call registry, the related Do-Not-Call Act, and finally our adoption here of requirements that maximize consistency with those adopted by the FTC create an overlap in federal regulations governing major telemarketing activities.[772] We hereby direct Commission staff to negotiate with FTC staff a Memorandum of Understanding between the respective staffs to achieve an efficient and effective enforcement strategy that will promote compliance with federal telemarketing regulations, consistent with the guidelines set forth below.

212. The FCC's jurisdiction over telemarketing is significantly broader than the FTC's. First, as noted above, the FTC does not have authority over telemarketing calls made by in-house employees of common carriers, banks, credit unions, savings and loans, insurance companies, and airlines. In addition, the FTC's telemarketing rules pertain only to interstate transmissions. In contrast, the FCC's telemarketing rules apply without exception to any entity engaged in any of

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[771] *See* <http://www.fcc.gov/eb/News_Releases/DOC-230145A1.html>.

[772] There are other overlapping regulations such as provisions governing abandoned calls, transmission of caller ID, and time-of-day restrictions. *See supra* paras. 146-159, 173-184, 208-210.

the telemarketing activities targeted by the TCPA and the Commission's related rules, including those that involve purely intrastate activities.[773] Given the substantial gaps in the FTC's authority over the full range of telemarketing activities, we contemplate that our enforcement staff will focus particularly on those activities and entities that fall outside the FTC's reach–airlines, banks, credit unions, savings and loans, insurance companies, and common carriers, as well as intrastate transmissions by any entity.

213. Nevertheless, we do not contemplate Commission enforcement that targets only those activities, entities, or transmissions that are outside the FTC's jurisdiction. The TCPA creates a statutory expectation for FCC enforcement in the telemarketing area.[774] Moreover, the TCPA's detailed standards pertaining to do-not-call matters evince Congressional intent that the FCC assume a prominent role in federal regulation of this aspect of telemarketing, a mandate that is not altered by the Do-Not-Call Act. Accordingly, even with the FTC's new do-not-call regulations, including its administration of a national do-not-call registry, we emphasize that the Commission must stand ready to enforce each of our telemarketing rules in appropriate cases. For reasons of efficiency and fairness, our staff will work closely with the FTC to avoid unnecessarily duplicative enforcement actions.

214. In determining enforcement priorities under the new telemarketing rules, we contemplate that the Enforcement Bureau will continue its policy of reviewing FCC and FTC consumer complaint data and conferring with appropriate state and federal agencies to detect both egregious violations and patterns of violations, and will act accordingly.[775] The

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[773] 47 U.S.C. § 152(b). *See supra* paras. 9 and 16.

[774] *See* 47 U.S.C.§ 227(f)(3), (7).

[775] Review of the FTC do-not-call database will be particularly important so that our enforcement staff can easily determine the date of

Enforcement Bureau has in place effective procedures to review aggregate complaint information to determine the general areas that merit enforcement actions, and to identify both particular violators and the individual consumers who may be able to assist the staff in pursuing enforcement actions against such violators.[776] Enforcement action could include, for example, forfeiture proceedings under section 503(b),[777] cease and desist proceedings under section 312(c), injunctions under section 401, and revocation of common carrier section 214 operating authority.

XVIII. OTHER ISSUES

A. Access to TCPA Inquiries and Complaints

215. The Commission stated that the *2002 Notice* was "prompted, in part, by the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements."[778] A few commenters maintain that the Commission should not consider final rules until parties have had an opportunity to analyze the consumer complaints referenced in the *2002 Notice*.[779] Other com-

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any do-not-call request and the date that a company last downloaded information from the database.

[776] In the course of its investigations, the Enforcement Bureau will follow up with individual complainants as appropriate. In light of the state court private right of action under the TCPA and the fact that many TCPA complaints are not against common carriers, consistent with existing practice, the staff will not necessarily contact each individual TCPA complainant. Compare 47 U.S.C. § 208.

[777] Before initiating a forfeiture proceeding against most entities that do not hold an FCC authorization, the violator must have received a Commission citation and then engaged in an additional violation. 47 U.S.C. § 503(b)(5).

[778] *See 2002 Notice*, 17 FCC Rcd at 17466, para. 8.

[779] *See, e.g.*, ATA Comments at 41-43 (stating that "[a]s a general matter, access to the [complaints] is necessary to ensure that 'interested parties have a meaningful opportunity to participate . . . and that the Court

menters contend that the number of complaints received by the Commission does not necessarily demonstrate a problem that demands government intervention.[780] The ATA filed a Freedom of Information Act (FOIA) request with the Commission on October 16, 2002, seeking access to the TCPA-related informal complaints.[781] The FOIA generally provides that any person has a right to obtain access to federal agency records, subject to enumerated exemptions from disclosure.[782] The FOIA requirements do not apply to records that contain "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[783] Many of the complaints sought by the ATA contain personal private information. In

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has an adequate record from which to determine whether the agency properly performed its functions.'"); MBNA Comments at 10 (requesting "an opportunity to review the complaints to determine the nature of the specific practices complained of, and the extent to which such practices reasonably require new TCPA rules . . .").

[780] *See, e.g.*, ABM Comments at 7; SBC Comments at 7-8, 17; BellSouth Comments at 4.

[781] The ATA's FOIA request was for copies of the over 11,000 complaints about telemarketing practices received during the period January 2000 through December 2001. The request also asked for copies of all similar complaints about telemarketing practices the FCC has received since January 1, 2002; copies of the over 1,500 inquiries about predictive dialing received from June 2000 to December 2001; and any non-publicly released FCC responses to the above-referenced complaints. *See Motion For Extension of Time* filed by the ATA, CG Docket No. 02-278, Tab 1, Electronic FOIA Request from Ronnie London. On November 14, 2002, following a meeting with the ATA regarding its FOIA request, CGB confirmed in a letter to ATA counsel that it would take a number of months and considerable staff resources in order to provide the over 11,000 documents covered by the request. *See* Letter from K. Dane Snowden, FCC, to Ronnie London, Counsel to ATA, November 14, 2002.

[782] *See* 5 U.S.C. § 552.

[783] 5 U.S.C. § 552(b)(6); *see also* 47 C.F.R. §§ 0.441 *et seq.*

addition, the complaints are part of a system of records subject to the Privacy Act.[784] For these reasons, the Commission agreed to release the complaints on a rolling basis only after personal information was redacted.[785] In response to ATA's FOIA request, the Commission has thus far provided approximately 2,420 redacted complaints.[786]

216. We agree with commenters that the increasing number of inquiries and complaints about telemarketing practices should not form the basis upon which we revise or adopt new

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[784] 5 U.S.C. § 552(a); 47 C.F.R. §§ 0.551 *et seq.*

[785] We explained that informal complaints often contain personally identifiable information such as addresses, phone numbers, social security numbers, and personal financial information. The ATA subsequently filed an *Application for Review of the Freedom of Information Action*, requesting that the Commission "overturn the staff's classification of the telemarketing complaints and predictive dialing inquiries as 'not routinely available' documents" and immediately release them for public consideration. *See Review of Freedom of Information Action* filed by the ATA at 5, CG Docket No. 02-278, December 6, 2002. (In the alternative, ATA requested that "the Commission require the staff to significantly accelerate its release of the redacted documents in time for consideration of them in the notice and comment period, and to substantially reduce or waive the charge associated with producing the requested documents.") On December 23, 2002, the ATA filed a *Motion for Expedited Review of its Application for Review of the Freedom of Information Act Action* to "ensure that ATA and other parties participating in the . . . proceeding are afforded timely access to critical documents central to the issues raised. . . by the [*2002 Notice*]." *See Motion for Expedited Review* at 1.

[786] As directed by the ATA, the Commission stopped processing the FOIA on January 27, 2003. The comment period in this proceeding was subsequently extended following the release of a Further Notice, and the ATA wrote to the Commission asking that the FOIA processing continue. However, the ATA did not represent that it would pay the additional FOIA fees that would accrue from the processing, and CGB wrote to the ATA for further directions. The ATA then paid for complaint records provided through January 27, 2003, and asked the Commission to continue processing the request. CGB has provided the ATA with a total of 2,420 redacted complaints thus far.

rules under the TCPA.[787] Rather, such information can be considered in determining whether to seek comment on the effectiveness of any of its rules.[788] We note that, even in the absence of any such complaints, the Commission is required by the Do-Not-Call Act to complete the TCPA rulemaking commenced last year. We disagree with commenters who suggest that parties must have access to all of the complaints referenced in the NPRM in order to be able to have a meaningful opportunity to participate in this proceeding.[789] It is not the existence of the complaints, or the number of complaints, that led the Commission to institute this proceeding to consider revision of its TCPA rules. Rather, our TCPA rules have been in place for more than ten years. We opened this proceeding to determine "whether the Com mission's rules need to be revised in order to more effectively carry out Congress's directives in the TCPA."[790] In any event, since September 2002, consumers, industry, and state governments have filed over 6,000 comments in this proceeding, during which time the Commission extended the comment periods twice and released a *Further Notice* in order to ensure that parties had ample opportunity to comment on possible FCC action. The substantial record compiled in this proceeding, along with the Commission's own

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[787] *See, e.g.*, ATA Comments at 36 (noting that "the Commission's tally of complaints, inquiries and website visits fails to demonstrate a significant problem . . . the existence of a complaint does not amount to a violation of the rules.")

[788] Other considerations included: the Commission's own enforcement experience; the amount of time that had passed since the Commission undertook a broad review of the TCPA rules, during which time telemarketing practices have changed significantly; and the actions by the FTC to consider changes to its telemarketing rules, including the establishment of a national do-not-call registry. *See 2002 Notice*, 17 FCC Rcd at 17464-68, para. 7-11.

[789] *See, e.g.*, ATA Comments at 41.

[790] *2002 Notice*, 17 FCC Rcd at 17461, para. 1.

enforcement experience, provides the basis for the actions we take here today.

B. Reports to Congress

217. The Do-Not-Call Act requires the Commission to transmit reports to Congress within 45 days after the promulgation of final rules in this proceeding, and annually thereafter.[791] By this Order, the Commission delegates its authority to the Chief, Consumer & Governmental Affairs Bureau, to issue all such reports.

XIX. PROCEDURAL ISSUES

A. Regulatory Flexibility Act Analysis

218. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[792] the Commission's Final Regulatory Flexibility Analysis in this Order is attached as Appendix B.

B. Paperwork Reduction Act Analysis

219. This Order contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under § 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collections contained in this proceeding.

C. Late-Filed Comments

220. We note that there were comments filed late in this proceeding. In the interest of having as complete and accurate a record as possible, we will accept late-filed comments and waive the requirements of 47 C.F.R. § 1.46(b).

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[791] *See* Do-Not-Call Act, Sec. 4.

[792] *See* 5 U.S.C. § 604.

D. Materials in Accessible Formats

221. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY). This *Report and Order* can also be downloaded in Text and ASCII formats at: http://www.fcc.gov/cgb/policy/telemarketing.html.

XX. ORDERING CLAUSES

222. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 222, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 222 and 227; and 47 C.F.R. § 64.1200 of the Commission's rules, and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557, the Report and Order in CG Docket No. 02-278 IS ADOPTED, and Parts 64 and 68 of the Commission's rules, 47 C.F.R. Parts 64.1200, 64.1601, and 68.318, are amended as set forth in Appendix A. The requirements of this Report and Order shall become effective 30 days after publication of a summary thereof in the Federal Register, with the following exceptions. As discussed herein, the national do-not-call rules at 47 C.F.R. § 64.1200(c)(2) will go into effect on October 1, 2003; the call abandonment rules at 47 C.F.R. §§ 64.1200(a)(5) and (6) will become effective on October 1, 2003; and the caller ID requirements at 47 C.F.R. § 64.1601(e) will go into effect on January 29, 2004. The amendments to the rules in § 64.1200 that contain information collection requirements under the PRA are not effective until approved by OMB. The Commission will publish a document in the Federal Register announcing the effective date of these rules.

223. IT IS FURTHER ORDERED that the comments addressing the applicability of the informal complaint rules to telemarketers ARE INCORPORATED into CI Docket 02-32.

224. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau shall have authority to issue any reports to Congress as required by the Do-Not-Call Implementation Act.

225. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix A

Final Rules

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64–MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. Authority:47 U.S.C. § 227.

* * * * *

2. Subpart L is amended by revising the Subpart Heading to read as follows:

Subpart L–Restrictions on Telemarketing and Telephone Solicitation

* * * * *

3. Section 64.1200 is revised to read as follows:

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service,

or other radio common carrier service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call:

(i) Is made for emergency purposes,

(ii) Is not made for a commercial purpose,

(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,

(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made, or

(v) Is made by or on behalf of a tax-exempt nonprofit organization.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(i) For purposes of paragraph (a)(3) of this section, a facsimile advertisement is not "unsolicited" if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.

(ii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(5) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(ii) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(6) of this section.

(7) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(9) of this section, to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. Any person or entity making telephone solicitations

(or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) it can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process; and

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date

of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be include ed given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in sections 64.1200(c) and 64.1200(d) are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(3) The term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated

entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(4) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(5) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(6) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(7) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(9) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission.

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(10) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(11) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 C.F.R. § 64.1200 and 16 C.F.R. Part 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the

telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

§ 64.1601 Delivery requirements and privacy restrictions.

4. Section 64.1601 is amended by adding paragraph (e) to read as follows:

* * * * *

(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(7) must transmit caller identification information.

(i) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.

(ii) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(iii) Tax-exempt nonprofit organizations are not required to comply with this paragraph.

§ 68.318 Additional limitations.

5. Section 68.318 is amended by revising (d) to read as follows:

* * * * *

(d) Telephone facsimile machines; Identification of the sender of the message. It shall be unlawful for person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted page.

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Appendix B

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[793] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking and Memorandum Opinion and Order[794] (*2002 Notice*) released by the Federal Communications Commission (Commission) on September 18, 2002. The Commission sought written public comments on the proposals contained in the *2002 Notice*, including comments on the IRFA. On March 25, 2003, the Commission released a Further Notice of Proposed Rulemaking (Further Notice), seeking comments on the requirements contained in the Do-Not-Call Implementation Act (Do-Not-Call Act),[795] which was signed into law on March 11, 2003.[796] None of the comments filed in this proceeding were specifically identified as comments addressing the IRFA; however, comments that address the impact of the proposed rules and policies on small entities are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[797]

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[793] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[794] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking (NPRM) and Memorandum Opinion and Order (MO&O), 17 FCC Rcd 17459, CG Docket No. 02-278 and CC Docket No. 92-90. In the MO&O, the Commission closed and terminated CC Docket No. 92-90 and opened a new docket to address the issues raised in this proceeding.

[795] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *to be codified at* 15 U.S.C. § 1601.

[796] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Further Notice of Proposed Rulemaking, 68 Fed. Reg. 16250 (March 25, 2003).

[797] *See* 5 U.S.C. § 604.

A. Need for, and Objectives of, the Order

2. Since 1992, when the Commission adopted rules pursuant to the Telephone Consumer Protection Act (TC PA),[798] telemarketing practices have changed significantly. New technologies have emerged that allow telemarketers to better target potential customers and make marketing using telephones and facsimile machines more cost-effective. At the same time, these new telemarketing techniques have heightened public concern about the effect telemarketing has on consumer privacy. A growing number of states have passed, or are considering, legislation to establish statewide do-not-call lists, and the Federal Trade Commission (FTC) has decided to establish a national do-not-call registry.[799] Congress provided in the TCPA that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[800]

3. The *2002 Notice* sought comments on whether to revise or clarify Commission rules governing unwanted telephone solicitations, the use of automatic telephone dialing systems, prerecorded or artificial voice messages, telephone facsimile machines, the effectiveness of company-specific do-not-call lists, and the appropriateness of establishing a national do-not-call list. In addition, in the IRFA, the Commission sought comments on the effect the proposed policies and rules would have on small business entities.[801]

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[798] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq*.

[799] *See Telemarketing Sales Rule*, 68 Fed. Reg. 4580 (Jan. 29, 2003).

[800] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

[801] *2002 Notice*, 17 FCC Rcd at 17497-501, paras. 70-80.

4. In this Report and Order (Order) the Commission revises the current TCPA rules and adopts new rules to provide consumers with additional options for avoiding unwanted telephone solicitations. We establish a national do-not-call registry for consumers who wish to avoid most unwanted telemarketing calls. This national do-not-call registry will supplement the current company-specific do-not-call rules, which will continue to permit consumers to request that particular companies not call them. The Commission also adopts a new provision to permit consumers registered with the national do-not-call list to provide permission to call to specific companies by an express written agreement. The TCPA rules exempt from the "do-not-call" requirements nonprofit organizations and companies with whom consumers have an established business relationship. The definition of "established business relationship" has been amended so that it is limited to 18 months from any purchase or financial transaction with the company and to three months from any inquiry or application from the consumer. Any company that is asked by a consumer, including an existing customer, not to call again must honor that request for five years. We retain the current calling time restrictions of 8:00 a.m. until 9:00 p.m.

5. To address the use of predictive dialers, we have determined that a telemarketer must abandon no more than three percent of calls answered by a person, must deliver a prerecorded identification message when abandoning a call, and must allow the telephone to ring for 15 seconds or four rings before disconnecting an unanswered call. The new rules also require all companies conducting telemarketing to transmit caller identification information when available, and they prohibit companies from blocking such information. The Commission has revised its earlier determination that an established business relationship constitutes express invitation or permission to receive an unsolicited facsimile advertisement. We find that the permission to send fax ads

must be in writing, include the recipient's signature, and clearly indicate the recipient's consent to receive such ads. In addition, we have clarified when fax broadcasters are liable for the transmission of unlawful fax advertisements.

6. We believe the rules the Commission adopts in the Order strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers. In addition, the Commission must comply with the Do-Not-Call Act, which requires the Commission to file an annual report to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science and Transportation. This report is to include: (1) an analysis of the effectiveness of the registry; (2) the number of consumers included on the registry; (3) the number of persons accessing the registry and the fees collected for such access; (4) a description of coordination with state do-not-call registries; and, lastly, (5) a description of coordination of the registry with the Commission's enforcement efforts.[802]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

7. There were no comments filed in direct response to the IRFA. Some commenters, however, raised issues and questions about the impact the proposed rules and policies would have on small entities. Telemarketers maintained that "telemarketing is used to introduce consumers to novel and competitive products and services,"[803] often offered by small businesses.[804] Some commenters insisted that business-to-business telemarketing is essential for small businesses.[805]

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[802] *See* Do-Not-Call Act, Sec. 4(b).

[803] WorldCom Reply Comments at 2.

[804] NEMA Comments at 8; PLP Comments at 1.

[805] *See e.g.*, Yellow Pages Comments at 2.

They indicated that they rely on fax broadcasting as a cost-effective form of advertising.[806] On the other hand, other small businesses have requested that the Commission allow their telephone numbers to be included on any national do-not-call list[807] and urged the Commission to adopt rules protecting them from unsolicited faxes.[808] The rules adopted herein reflect not only the difficult balancing of individuals' privacy rights against the protections afforded commercial speech, but the difficult balancing of the interests of small businesses that rely on telemarketing against those that are harmed by unwanted telephone calls and facsimile transmissions. The amended rules should reduce burdens on both consumers and businesses, including small businesses.

8. *National Do-Not-Call List.* As discussed more extensively in the Order,[809] some commenters opposed the adoption of a national do-not-call registry, stating that company-specific do-not-call lists adequately protect consumer privacy.[810] Other commenters supported the establishment of a national do-not-call registry, arguing that "further regulation is needed because the current system does little or nothing to protect privacy in the home."[811] NFIB "believes that significant burdens are being placed upon businesses of all sizes in order to comply with the regulations . . ., but that small businesses bear the brunt of those burdens."[812] NFIB suggested that women, minorities

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[806] NADA Comments at 2-3.

[807] John Shaw Reply Comments at 10; Mathemaesthetics Comments at 6; Gail Berk Comments.

[808] John Holcomb Comments at 1; Jim Carter Comments.

[809] Order, paras. 21, 88.

[810] *See e.g.*, MBNA Comments at 4.

[811] *See e.g.*, Privacy Rights at 2.

[812] NFIB Comments at 1. *See also*, PLP Comments at 4; NEMA Comments at 8.

and small businesses will be affected disproportionately by any new restrictions.[813] And, some commenters maintained that businesses, including small businesses, will suffer a reduction in telemarketing sales as a result of the establishment of a national do-not-call list.[814] SBSC, while opposed to a national do-not-call list, nevertheless offered a recommendation that would make such a list less onerous for small businesses. SBSC suggested exempting local calls that might result in a face-to-face transaction from the do-not-call list requirements.[815] NAIFA also encouraged exempting calls which result in face-to-face meetings and recommended an exemption for those businesses that make a *de minimus* number of calls.[816]

9. The Commission received comments arguing that a national do-not-call list "would be cumbersome"[817] and too expensive for small businesses to use.[818] DSA specifically indicated that a national do-not-call list would increase businesses' start-up costs if they were required to purchase the list.[819] In addition, MBA maintained that many small lenders use referrals from existing customers, not large lists, to attract new business. Such referrals, MBA suggested, will be difficult to scrub against a national do-not-call list.[820] Some

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[813] MBNA Comments at 3; MBNA Reply at 7.

[814] MBNA Comments at 3.

[815] SBSC Comments at 2-3. *See also*, PLP Comments at 4-5; MBA Reply at 5-6; Farmers Comments at 1.

[816] NAIFA Comments at 3-4. *See also*, DSA Comments at 6-7 and Vector Comments at 8-10.

[817] NAMB Comments at 2; NRF Comments at 9-10.

[818] MBA Comments at 3.

[819] DSA Comments at 4-5. *See also*, NAA Comments at 10-11.

[820] MBA Comments at 3. *See also*, MPA Comments at 10-11 ("small businesses will be daunted by or unable to afford the computer processing

commenters suggested that an option to help reduce the cost of a national do-not-call list for small businesses would be to offer smaller pieces of the list to small businesses.[821]

10. Yellow Pages urged the Commission to continue to exempt business-to-business calls from a national do-not-call list, because small businesses benefit tremendously by advertising in yellow pages and on-line.[822] However, other commenters requested that small businesses be allowed to include their telephone numbers on the national do-not-call list.[823] One small business commenter stated that ". . . telemarketing . . . interferes with business operations, especially small business operations . . . ."[824] Another commenter argued that "people that work from home . . . should not have to be bothered with telemarketing calls that would impact their job performance and potentially their ability to make a living."[825] Finally, some have assured the Commission that a national do-not-call list would be manageable and feasible to maintain.[826] NCS, for example, maintained that even extremely small telemarketers could gain access to the do-not-call list at a reasonable cost using the Internet.[827]

11. *Website or Toll-Free Number to Access Company-Specific Lists and to Confirm Requests.* The Commission sought comment on whether to consider any modifications

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time and expense involved in 'scrubbing' their relatively small marketing lists against a [national list]"); *see also* NRF Comments at 9.

[821] Strang Reply Comments at 12. *See also* Joe W. McDaniel-First Dec 4, 2002 Comments.

[822] Yellow Pages Comments at 2-4.

[823] Mathemaesthetics Comments at 6.

[824] Mathemaesthetics Comments at 6.

[825] David T. Piekarski Comments (Docket No. 03-62) at 1-2.

[826] NCS Comments at 4-5. *See also*, Mathemaesthetics Comments at 7-8.

[827] NCS Comments at 5.

that would allow consumers greater flexibility to register on company-specific do-not-call lists.[828] We specifically asked whether companies should be required to provide a toll-free number and/or website that consumers can access to register their names on do-not-call lists.[829] Some commenters argued that it would be costly if small, local businesses were required to design and maintain websites or provide toll-free numbers for consumers to make do-not-call requests.[830] In addition, they maintained that businesses should not be required to confirm registration of a consumer's name on a company's do-not-call list.[831] Confirmations by mail, they stated, would be expensive for a business and probably perceived by the consumer as "junk mail."[832]

12. *Established Business Relationship*. One issue raised by commenters as particularly burdensome for small business was monitoring existing business relationships and do-not-call requests. NFIB stated that members have found requests by existing customers to cease contacting them "unwieldy and difficult . . . to translate as a business practice."[833] "An individual who continues to interact with a [sic] these small businesses following a 'do not contact' request does not sever the business relationship *de facto* . . ."[834] According to NFIB, it should be the right of the business to continue to call that customer. They argued that it should be the responsibility

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[828] *2002 Notice*, 17 FCC Rcd at 17470-71, para. 17.

[829] *2002 Notice*, 17 FCC Rcd at 17470-71, para. 17.

[830] MBA Comments at 6.

[831] MBA Comments at 6-7.

[832] MBA Comments at 6-7.

[833] NFIB Comments at 2.

[834] NFIB Comments at 2.

of the customer to terminate the relationship with that business affirmatively.[835]

13. NADA indicated that there has been no significant change that would warrant a revision of the established business relationship exemption.[836] In fact, NADA stated that "narrowing the exemption would unnecessarily deprive small businesses of a cost-effective marketing opportunity."[837] According to NADA, small businesses must maximize their marketing resources and the best way to do so is to direct their marketing efforts toward their existing customers.[838]

14. While no commenter specifically addressed the effect of time limits on small businesses, several entities discussed time limits for the established business relationship rule in general.[839] DMA indicated the difficulty in establishing a "clock" that "will apply across all the industries that use the phone to relate to their customers."[840] DMA continued by stating "[d]ifferent business models require different periods of time."[841] This concept was supported by Nextel, "the FTC's eighteen-month limit on its EBR rule would be inappropriate for the telecommunications industry" and would "dramatically increase administrative burdens and costs for all businesses as they would be forced to monitor and record every customer inquiry and purchasing pattern to ensure compliance with the FCC's rules."[842]

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[835] NFIB Comments at 2.

[836] NADA Comments at 2.

[837] NADA Comments at 2.

[838] NADA Comments at 2.

[839] *See, e.g.*, NASUCA Comments at 17-18; DMA Comments at 20-21; Nextel Reply Comments at 11-13.

[840] DMA Comments at 20.

[841] DMA Comments at 20.

[842] Nextel Reply Comments 12-13.

15. *Unsolicited Facsimile Advertising and "War Dialing".* Privacy Rights commented that the practice of dialing large blocks of numbers to identify facsimile lines, *i.e.*, "war dialing," should be prohibited, especially because such calls cannot be characterized as telemarketing.[843] It argued that "this practice is particularly troubling for small business owners who often work out of home offices" because it deprives the small business owner of the use of the equipment, creates an annoyance and interrupts business calls.[844]

16. NFIB advocated on behalf of its small business members that "the ability to fax information to their established customers is an essential commercial tool."[845] Any customer who provides contact information when patronizing a business is providing express permission to be contacted by that business, including via facsimile advertising.[846] In addition, NFIB indicated that businesses engaged in facsimile advertising should not be required to identify themselves, and that customers should be required to notify the business that they do not wish to receive such faxes.[847] NADA agreed that the Commission should "preserve its determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive fax advertisements."[848] According to NADA, changing these rules would deprive small businesses of a marketing tool upon which they have come to rely.[849]

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[843] Privacy Rights Comments at 4-5.

[844] Privacy Rights Comments at 4-5.

[845] NFIB Comments at 3-4. *See also*, NADA Comments at 2-3.

[846] NFIB Comments at 3-4.

[847] NFIB Comments at 3-4. *But see,* Mathemaesthetics Comments at 2-5.

[848] NADA Comments at 2.

[849] NADA Comments at 2.

17. Other commenters disagreed, explaining that numerous small businesses are burdened by the intrusion of ringing telephones and fax machines,[850] the receipt of advertisements in which they are not interested,[851] the depletion of toner and paper,[852] and the time spent dealing with these unwanted faxes.[853] A few home-based businesses and other companies maintain that facsimile advertisements interfere with the receipt of faxes connected to their own business, and that the time spent collecting and sorting these faxes increases their labor costs.[854] In fact, NFIB has received complaints from its own members "who . . . failed to realize that their membership entitles them to the receipt of such information via fax."[855]

18. *Caller ID Requirements*. In response to the Commission's proposal to require telemarketers to transmit caller ID or prohibit the blocking of such information, NYSCPB favored prohibiting the intentional blocking of caller ID

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[850] Mathemaesthetics Comments at 2.

[851] Jeff Bryson Comments; Carolyn Capps Comments at 2.

[852] Michael C. Addison Comments.

[853] John Holcomb Comments at 1.

[854] Jim Carter Comments; JC Homola Comments; Autoflex Comments at 1-2; Rob McNeal Comments (unsolicited faxes costs company tens of thousands of dollars each year in materials and employee time); *see also* NCL Comments at 6 ("[P]eople who work out of their homes are especially harmed by unsolicited faxes, which use up their paper and toner and tie up their machines."); Mathemaesthetics Reply Comments at 7 ("[U]nsolicited [fax] ads caused my business fax machine to become prematurely empty, which rendered *wholly useless* the equipment my small business crucially depends on for its revenue. When a customer of mine a short time later attempted to fax a purchase order for over $3,000 worth of my company's product, my empty fax machine was not able to capture this transaction for a significant period of time . . . ." (emphasis in original)).

[855] NFIB Comments at 2 (emphasis added).

information, but acknowledged that requiring the transmission of caller ID may be inappropriate for smaller firms.[856] NYSCPB stated that "[w]hile mandatory transmission of caller ID information would undoubtedly facilitate do-not-call enforcement . . . we would not want to impose onerous burdens on smaller, less technically sophisticated firms . . . ."[857] In addition, NYSCPB suggested that smaller businesses that lack the capability to transmit caller ID be exempt from providing caller ID information until the business installs new equipment with caller ID capabilities.[858]

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

19. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[859] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[860] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[861] Under the Small Business Act, a "small business

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[856] NYSCPB-Other Than National DNC List Comments at 9-10.

[857] NYSCPB-Other Than National DNC List Comments at 9.

[858] NYSCPB-Other Than National DNC List Comments at 10.

[859] 5 U.S.C. § 604(a)(3).

[860] 5 U.S.C. § 601(6).

[861] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comments, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) satisfies any additional criteria established by the Small Business Administration (SBA).[862]

20. The Commission's rules on telephone solicitation and the use of autodialers, artificial or prerecorded messages and telephone facsimile machines apply to a wide range of entities, including all entities that use the telephone or facsimile machine to advertise.[863] That is, our action affects the myriad of businesses throughout the nation that use telemarketing to advertise. For instance, funeral homes, mortgage brokers, automobile dealers, newspapers and telecommunications companies could all be affected. Thus, we expect that the rules adopted in this proceeding could have a significant economic impact on a substantial number of small entities.

Nationwide, there are a total of 22.4 million small businesses, according to SBA data.[864] And, as of 1992, nationwide there were approximately 275,801 small organizations [not-for-profit].[865]

22. Again, we note that our action affects an exhaustive list of business types and varieties. We will mention with particularity the intermediary groups that engage in this activity. SBA has determined that "telemarketing bureaus" with $6 million or less in annual receipts qualify as small businesses.[866] For 1997, there were 1,727 firms in the "tele-

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[862] 15 U.S.C. § 632.

[863] 47 C.F.R. § 64.1200.

[864] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[865] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[866] *See* 13 C.F.R. § 121.201, NAICS code 561422.

marketing bureau" category, total, which operated for the entire year.[867] Of this total, 1,536 reported annual receipts of less than $5 million, and an additional 77 reported receipts of $5 million to $9,999,999. Therefore, the majority of such firms can be considered to be small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

23. The rules contained herein require significant recordkeeping requirements on the part of businesses, including small business entities. First, while the national do-not-call list will be developed and maintained by the FTC, all businesses that engage in telemarketing will be responsible for obtaining the list of telephone numbers on the national do-not-call list and scrubbing their calling lists to avoid calling those numbers.[868] They must also continue to be responsible for maintaining their own company-specific do-not-call lists; however, this is not a new requirement, but a continuation of the Commission's existing rules. The Commission has reduced the period of time that businesses must retain company-specific do-not-call requests from 10 years to five years. In addition, for those businesses, including small businesses, that wish to call consumers under the "established business relationship" exemption, they must continue to maintain customer lists in the normal course of business. Because of the time limits associated with this rule, businesses will need to monitor and record consumer contacts to assure that they are complying with the 18-month and three-month provisions in the rule. Businesses that want to

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[867] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Administrative and Support and Waste Management and Remediation Services, Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 561422 (issued Oct. 2000).

[868] Order, paras 16-85.

call consumers with whom they have no relationship, but who are listed on the national do-not-call list, must obtain a consumer's express permission to call. This permission must be evidenced by a signed, written agreement.

24. Second, all businesses that use autodialers, including predictive dialers, to sell goods or services, will be required to maintain records documenting compliance with the call abandonment rules.[869] Such records should demonstrate the telemarketers' compliance with a call abandonment rate of no less than three percent measured over a 30-day period, with the two-second-transfer rule, and with the ring duration requirement.

25. Third, with the exception of tax-exempt nonprofit organizations, all businesses that engage in telemarketing will be required to transmit caller ID information.[870]

26. Fourth, businesses that advertise by fax will be required to maintain records demonstrating that recipients have provided express permission to send fax advertisements. Such permission must be given in writing, and businesses must document that they have obtained the required permission.[871]

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

27. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification,

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[869] Order, paras. 129-134, 146-159.

[870] Order, paras. 173-184.

[871] Order, paras. 185-203.

consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[872]

28. There were five specific areas in which the Commission considered alternatives for small businesses. These areas were: (1) establishing a National Do-Not-Call List ((a) providing a portion of the national do-not-call list (five area codes) for free, (b) providing businesses with 30 days to process do-not-call requests, and (c) reducing the do-not-call record retention rate from 10 years to five years); (2) maintaining the current established business rule exemption and adopting the FTC's time limits of 18 months and three months; (3) establishing a call abandonment rate of three percent, rather than zero percent, and measuring the rate over a 30-day period, rather than on a per day basis; (4) continuing to prohibit facsimile advertising to residential and business numbers; and (5) declining to require businesses to maintain a website or toll-free number for do-not-call requests or confirmation of such requests by consumers. As mentioned, *supra,* in Section B of the FRFA, small businesses presented arguments on both sides of each of these issues.

29. *National Do-Not-Call List.* This Order establishes a national do-not-call list for those residential telephone subscribers who wish to avoid most unwanted telephone solicitations.[873] Although many businesses, including small businesses, objected to a national do-not-call registry,[874] the Commission determined that a national do-not-call list was necessary to carry out the directives in the TCPA. We agreed with those commenters who maintained that the company-

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[872] 5 U.S.C. § 603(c)(1)-(c)(4).

[873] Order, paras. 25-41.

[874] *See e.g.*, MBNA Comments at 4.

specific approach to concerns about unwanted telephone solicitations does not alone adequately protect individuals' privacy interests.[875] We declined to exempt local solicitations and small businesses from the national do-not-call list.[876] Given the numerous entities that solicit by telephone, and the technological tools that allow even small entities to make a significant number of solicitation calls, we believe that to do so would undermine the effectiveness of the national do-not-call rules in protecting consumer privacy. In addition, we declined to permit businesses to register their numbers on the national do-not-call registry, despite the requests of numerous small business owners to do so.[877] The TCPA expressly contemplates that a national do-not-call database includes residential telephone subscribers' numbers. Although business numbers will not be included in the national do-not-call database, a business could nevertheless *request* that its number be added to a company's do-not-call list.

30. The Commission considered the costs to small businesses of purchasing the national do-not-call list. In an attempt to minimize the cost for small businesses, we have considered an alternative and determined that businesses will be allowed to obtain up to five area codes free of charge.[878] Since many small businesses telemarket within a local area, providing five area codes at no cost should help to reduce or eliminate the costs of purchasing the national registry for small businesses.[879] Furthermore, as suggested by NCS, small

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[875] *See e.g.*, Privacy Rights Comments at 2.

[876] Order, paras. 46-49, 54.

[877] *See e.g.*, Mathemaesthetics Comments at 6.

[878] Order, para. 54.

[879] *See e.g.*, MBA Reply at 3; NAA Comments at 3; SBSC Comments at 2; PLP Comments at 5.

businesses should be able to gain access to the national list in an efficient, cost-effective manner via the Internet.[880]

31. As discussed extensively in the Order, many businesses, including small business entities, requested specific exemptions from the requirements of a national do-not-call list.[881] In order to minimize potential confusion for both consumers and businesses alike, we declined to create specific exemptions for small businesses.[882] We believe the exemptions adopted for calls made to consumers with whom a seller has an established business relationship and those that have provided express agreement to be called provide businesses with a reasonable opportunity to conduct their business while protecting consumer privacy interests.

32. The Commission also considered modifying for small businesses the time frames for (1) processing consumers' do-not-call requests; (2) retaining consumer do-not-call records; and (3) scrubbing calling lists against the national do-not-call registry. In doing so, we recognized the limitations on small businesses of processing requests in a timely manner.[883] Therefore, we determined to require that both large and small businesses must honor do-not-call requests within 30 days from the date such a request is made, instead of requiring that businesses honor requests in less time.[884] Although some commenters suggested periods of up to 60 to 90 days to process do-not-call requests, we determined that such an inconsistency in the rules would lead to confusion for

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[880] NCS Comments at 4-5.

[881] *See e.g.*, NAA Comments at 12-14 (exempt newspapers); NAIFA Comments at 3 (exempt referral calls); SBSC Comments at 2 (exempt local calls); MBA Comments at 5 (exempt calls to set up face-to-face meetings).

[882] Order, paras. 46-54.

[883] Order, para. 94.

[884] Order, para. 94.

consumers. Consumers might not easily recognize that the telemarketer calling represented a small business and that they must then allow a longer period of time for their do-not-call requests to be processed.

33. The Commission also determined to reduce the retention period of do-not-call records from 10 years to five years.[885] This modification should benefit businesses that are concerned about telephone numbers that change hands over time. They argue that a shorter retention requirement will result in do-not-call lists that more accurately reflect those consumers who have requested not to be called. Finally, we considered allowing small businesses additional time to scrub their customer call lists against the national do-not-call database. The FTC's rules require telemarketers to scrub their lists every 90 days. For the sake of consistency, and to avoid confusion on the part of consumers and businesses, the Commission determined to require all businesses to access the national registry and scrub their calling lists of numbers in the registry every 90 days.

34. *Established Business Relationship*. We have modified the current definition of "established business relationship"[886] so that it is limited in duration to 18 months from any purchase or transaction and three months from any inquiry or application. The revised definition is consistent with the definition adopted by the FTC.[887] We concluded that regulating the duration of an established business relationship is necessary to minimize confusion and frustration for consumers who receive calls from companies they have not contacted or patronized for many years. There was little consensus among industry members about how long an established business relationship should last following a

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[885] Order, para. 92.

[886] Order, para. 113.

[887] *See FTC Order*, 68 Fed. Reg. 4580 at 4591-94.

transaction between the consumer and seller.[888] We believe the 18-month timeframe strikes an appropriate balance between industry practices and consumer privacy interests. Although businesses, including small businesses must monitor the length of relationships with their customers to determine whether they can lawfully call a customer, we believe that a rule consistent with the FTC's will benefit businesses by creating one uniform standard with which businesses must comply.

35. *Call Abandonment.* In the *2002 Notice*, the Commission requested information on the use of predictive dialers and the harms that result when predictive dialers abandon calls.[889] In response, some small businesses urged the Commission to adopt a maximum rate of zero on abandoned calls. They described their frustration over hang-up calls that interrupt their work and with answering the phone "only to find complete silence on the other end."[890] Most industry members encouraged the Commission to adopt an abandonment rate of no less than five percent, claiming that this rate "minimizes abandoned calls, while still allowing for the substantial benefits achieved by predictive dialers."[891] The Commission has determined that a three percent maximum rate on abandoned calls balances the interests of businesses that derive economic benefits from predictive dialers and consumers who find intrusive those calls delivered by predictive dialers.[892] We believe that this alternative, a rate of three percent, will also benefit small businesses that are affected by interruptions from hang-ups and "dead air" calls.

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[888] *See, e.g.*, Bank of America Comments at 4 (36 months); MPA Comments at 12-13 (24 months); Sprint Comments at 18 (12 months).

[889] *2002 Notice*, 17 FCC Rcd at 17475-76, para. 26.

[890] Mathemaesthetics Comments at 6.

[891] WorldCom Reply at 18-19.

[892] Order, paras. 150-152.

36. The three percent rate will be measured over a 30-day period, rather than on a per day basis. Industry members maintained that a per day measurement would not account for short-term fluctuations in marketing campaigns[893] and may be overly burdensome to smaller telemarketers. We believe that measuring the three percent rate over a longer period of time will still reduce the overall number of abandoned calls, yet permit telemarketers to manage individual calling campaigns effectively. It will also permit telemarketers to more easily comply with the recordkeeping requirements associated with the use of predictive dialers.

37. *Unsolicited Facsimile Advertising.* The record reveals that facsimile advertising can both benefit and harm small businesses with limited resources. The small businesses and organizations that rely upon faxing as a cost-effective way to advertise insist that the Commission allow facsimile advertising to continue.[894] Other small businesses contend that facsimile advertising interferes with their daily operations, increases labor costs, and wastes resources such as paper and toner.[895] The Commission has reversed its prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers.[896] Under the amended rules, a business may advertise by fax with the prior express permission of the fax recipient, which must be in writing.[897] Businesses may obtain such written permission through direct mail, websites, or during interaction with customers in their stores. This

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[893] *See, e.g.,* WorldCom Further Comments at 8; Teleperformance Further Comments at 4.

[894] NFIB Comments at 3-4.

[895] John Holcomb Comments at 1; Mathemaesthetics Comments at 2-3.

[896] Order, para. 189.

[897] Order, para. 191.

alternative will benefit those small businesses, which are inundated with unwanted fax advertisements.

38. *Website or Toll-Free Number to Access Company-Specific Lists and to Confirm Requests.* Lastly, the Commission has determined not to require businesses to provide a website or toll-free number for consumers to request placement on company-specific do-not-call lists or to respond affirmatively to do-not-call requests or otherwise provide some means of confirmation that consumers have been added to a company's do-not-call list.[898] Several commenters indicated that such requirements would be costly to small businesses.[899] Although we believe these measures would improve the ability of consumers to register do-not-call requests, we agree that such requirements would be potentially costly to businesses, particularly small businesses. Instead, we believe that the national do-not-call registry will provide consumers with a viable alternative if they are concerned that their company-specific do-not-call requests are not being honored. In addition, consumers may pursue a private right of action if there is a violation of the do-not-call rules. This alternative should reduce, for small businesses who engage in telemarketing, both the potential cost and resource burdens of maintaining company-specific lists.

39. REPORT TO CONGRESS: The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[900] In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of

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[898] Order, para. 93.

[899] MBA Comments at 6-7.

[900] *See* 5 U.S.C. § 801(a)(1)(A).

the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[901]

[901] *See* 5 U.S.C. § 604(b).

Appendix C

Comments Filed

Due to the significant number of comments filed by individual consumers in this proceeding, we have listed below only those comments received from industry, consumer advocacy groups and governmental entities. All individual consumer comments, including those cited in the Report and Order, are available for inspection on the Commission's Electronic Comment Filing System (ECFS).

ACI Telecentrics Incorporated (5-2-03)	ACI
Allstate Life Insurance Company (Lisa Behzad; 12-9-02)	Allstate
Americall Group, Inc. (11-26-02)	Americall
American Association of Blood Banks (Marlene H. Dortch; 12-6-02)	AABB
American Association of Retired Persons (AARP; 1-31-03)	AARP
American Bankers Association (12-9-02)	ABA
American Business Media (11-22-02)	ABM
American Express Company (12-5-02)	American Express
American General Finance, Inc. (12-10-02)	AGF
American Insurance Association (11-21-02)	AIA
American International Automobile Dealers Association (12-9-02)	AIADA
American Red Cross (12-9-02)	Red Cross
American Resort Development Association (11-15-02)	ARDA
American Teleservices Association (12-9-02) (12-23-02)	ATA
America's Blood Centers (Jeanne Dariotis; 12-5-02)	ABC
Ameriquest Mortgage Company (12-9-02)	Ameriquest
Association for Communications Technology Professionals in Higher Education (ACUTA, Inc.) and Association of College and University Housing Officers-International (ACUHO-I) (ACUTA and ACUHO-I; 12-9-02)	ACUTA
Association for Competitive Technology (12-9-02)	ACT
Association of Fundraising Professionals (11-27-02)	AFP
AT&T Wireless Services, Inc. (12-9-02)	AT&T Wireless
Autoflex Leasing (11-18-02)	Autoflex

Avinta Communications, Inc. (Abraham Y. Chen; 11-18-02)	Avinta
Bank of America (12-3-02)	Bank of America
BellSouth Corporation (12-9-02)	BellSouth
Blocklist.com (12-9-02)	Blocklist.com
BMO Financial Group (12-9-02)	BMO Financial
The Broadcast Team (12-6-02)	TBT
Brunswick Corporation (12-9-02)	Brunswick
Californians Against Telephone Solicitation (Robert Arkow; 12-9-02)	CATS
Call Compliance, Inc. (12-9-02)	Call Compliance
Castel, Inc. (2-28-03)	Castel
Cellular Telecommunications & Internet Association (12-9-02)	CTIA
Cendant Corporation (11-22-02)	Cendant
Center for Democracy & Technology (12-9-02)	CDT
Cherry Communications (11-21-02)	Cherry
Cingular Wireless LLC (12-9-02)	Cingular
Citigroup, Inc. (12-12-02)	Citigroup
City of Chicago (11-22-02)	City of Chicago
CMOR (12-9-02)	CMOR
CNN.com (4-22-03)	CNN
Colorado Public Utilities Commission (12-3-02)	CO PUC
Comcast Cable Communications, Inc. (12-9-02)	Comcast
Concerned Telephone Companies (12-9-02)	CTC
Consumer Bankers Association (12-9-02)	CBA
Consumer Choice Coalition (12-2-02)	Coalition
Consumer Disability Telecommunications Advisory Committee (12-24-02)	CDTAC
Consumer Mortgage Coalition (12-19-02)	CMC
Convergys Corporation (12-9-02)	Convergys
Copilevitz and Canter, LLC (William E. Raney; 12-9-02)	Copilevitz & Canter
Cox Enterprises, Inc. (12-9-02)	Cox
DialAmerica Marketing, Inc. (12-10-02)	DialAmerica
Direct Marketing Association (12-9-02)	DMA
Direct Selling Association (12-9-02)	DSA
DIRECTV, Inc. (12-9-02)	DIRECTV

Discover Bank (12-9-02)	Discover
Electronic Privacy Information Center; Consumer Task Force for Automotive Issues; Remar Sutton; Consumer Action; Privacy Rights Clearinghouse; Consumer Federation of America; International Union, UAW; Free Congress Foundation; Junkbusters Corp.; Consumer Project on Technology; Computer Professionals for Social Responsibility; and Private Citizens, Inc. (12-9-02)	EPIC
Electronic Retailing Association (12-9-02)	ERA
Emergency Communications Network, Inc. (12-6-02)	ECN
Farmers Insurance Group (11-22-02)	Farmers
Financial Services Roundtable (12-12-02)	FSR
Florida Department of Agriculture and Consumer Services (1-8-03)	FL DACS
Fund for Public Interest Research, Inc. (Jon Scarlett; 12-6-02)	Fund for Public Interest
Globecomm Systems, Inc. (12-9-02)	Globecomm
Hilton Head Hospitality Resort Services (1-31-03)	Hilton Head
Household Automotive Finance Corporation; OFL-A Receivables Corp.; and Household Automotive Credit Corporation (12-9-02)	Household Automotive
Household Bank (SB), N.A. (12-9-02)	Household Bank
Household Finance Corp. (House Hold Finance Corporation; 12-12-02)	Household Finance
Household Financial Services, Inc. (12-10-02)	HFS
Hunton & Williams (11-22-02)	Hunton & Williams
IBM Corporate Market Intelligence (2-4-03)	IBM
Intellidyn Corporation (Kathie Fleischer; 12-4-02)	Intellidyn
Interactive Teleservices Corporation (Barbara Bricker; 4-10-03) (Duane L. Billingslea; 4-11-03)	ITC
Intrado Inc. (11-22-02)	Intrado
Intuit, Inc. (12-9-02)	Intuit
Katz & Korin (Robert J. Schuckit; 10-5-02)	Katz & Korin
Kauffman Group Inc. (11-25-02)	Kauffman
Kondos & Kondos Law Offices (11-14-02)	Kondos & Kondos
LCC International, Inc. (12-9-02)	LCC
The Leukemia & Lymphoma Society (George Dahlman; 1-31-03 and 5-2-03)	L&LS

LSSi Corp. (12-9-02)	LSSi
Magazine Publishers of America (12-9-02)	MPA
March of Dimes (11-22-02)	March of Dimes
MasterCard International Incorporated (12-9-02)	Mastercard
Mathemaesthetics, Inc. (11-22-02) (*see also* Douglas M. McKenna)	Mathemaesthetics
MBNA America Bank, N.A. (12-9-02) (Revised 12-10-02)	MBNA
Metris Companies, Inc. (12-6-02)	Metris
Meyer Associates, Inc. ([Thoams] Caprio; 4-24-03)	Meyer
MidFirst Bank (1-9-03)	MidFirst
Mortgage Bankers Association of America (12-9-02)	MBA
Mortgage Investors Corporation, Inc. (12-9-02)	Mortgage Investors
Mothers Against Drunk Driving (1-30-03) (Wendy J. Hamilton; 5-1-03)	MADD
Moultrie Independent Telephone Company (12-9-02)	Moultrie
National Association of Attorneys General (12-9-02)	NAAG
National Association of Broadcasters (12-9-02)	NAB
National Association of Consumer Agency Administrators (Kathleen Thuner, President; 11-22-02)	NACAA
National Association of Independent Insurers (12-10-02)	NAII
National Association of Insurance & Financial Advisors (11-22-02)	NAIFA
National Association of Mortgage Brokers (12-9-02) (*see also* Armand Cosenza)	NAMB
National Association of Regulatory Utility Commissioners (11-22-02)	NARUC
National Association of State Utility Consumer Advocates (NASUCA; 12-9-02)	NASUCA
National Automobile Dealers Association (12-10-02)	NADA
National Cable & Telecommunications Association (12-9-02)	NCTA
National Consumers League (12-6-02)	NCL
National Energy Marketers Association (11-22-02)	NEM
National Federation of Independent Business (1-9-03)	NFIB
National Public Radio, Inc. (12-9-02)	NPR
National Retail Federation (12-9-02)	NRF
National Telecommunications Cooperative Association (11-22-02)	NTCA

NCS Pearson, Inc. (12-9-02)	NCS
NeuStar, Inc. (12-9-02)	NeuStar
New Orleans, Utility, Cable & Telecommunications Committee of the City Council (11-18-02)	City of New Orleans
Newsletter & Electronic Publishers Association (12-9-02)	NEPA
Newspaper Association of America (12-9-02)	NAA
New York State Consumer Protection Board (11-22-02) (3 comments)	NYSCPB
Nextel Communications, Inc. (12-9-02)	Nextel
Nielsen Media Research, Inc. (1-31-03)	Nielsen
North Dakota Public Service Commission (12-2-02)	ND PSC
Not-For-Profit and Charitable Coalition (11-22-02)	NPCC
Office of the People's Counsel for the District of Columbia (Elizabeth A. Noel; 12-9-02)	OPC-DC
Ohio, Public Utilities Commission (12-9-02)	PUC of Ohio
Oregon Telecommunications Association (12-3-02)	OTA
Pacesetter Corporation (11-20-02)	Pacesetter
Personal Legal Plans, Inc. (12-16-02)	PLP
Progressive Casualty Insurance Company (11-18-02)	Progressive Casualty
Privacilla.org (12-9-02)	Privacilla.org
Privacy Rights Clearinghouse (Beth Givens; 12-5-02)	PRC
Private Citizen, Inc. (12-9-02)	Private Citizen
Process Handler et al. For Hire, Inc. (5-14-03)	Process Handler
Progressive Business Publications (Edward M. Satell; 4-28-03)	Progressive Business
Qwest Services Corporation (12-9-02)	Qwest
R & D Lawn & Tree Services (11-18-02)	R & D
Reed Elsevier, Inc. (12-9-02)	Reed
Reese Brothers, Inc. (12-9-02)	Reese
Response Catalyst (Doug Hibbeler; 12-9-02)	Response Catalyst
Royal Sonesta Hotel (4-7-03)	Royal Sonesta
SBC Communications, Inc. (12-9-02)	SBC
Scholastic, Inc. (12-9-02)	Scholastic
The Seattle Times Company (12-9-02)	Seattle Times
SER Solutions, Inc. (11-19-02)	SER
Small Business Survival Committee (1-31-03)	SBSC
Special Olympics Florida (Laurie Moyson; 5-8-03)	Special Olympics FL

Special Olympics Hawaii (Nancy Bottelo; 1-30-03)	Special Olympics HI
Special Olympics Kansas (5-1-03)	Special Olympics KS
Special Olympics New Jersey (Suzanne Schwanda; 1-31-03)	Special Olympics NJ
Special Olympics New Mexico (Randy Mascorella; 4-30-03)	Special Olympics NM
Special Olympics New York (5-2-03)	Special Olympics NY
Special Olympics Ohio (Federal Communications Commission; 1-31-03)	Special Olympics OH
Special Olympics Virginia (5-2-03)	Special Olympics VA
Special Olympics Wisconsin (Dennis H. Alldridge; 1-30-03)	Special Olympics WI
Sprint (12-9-02)	Sprint
Student Parent Support Services Corp. (3-19-03)	Student Support
Suggs & Associates, P.C. (James [M.Suggs]; 12-4-02)	Suggs
Sytel Limited (12-9-02)	Sytel
Technion Communications Corp. (11-19-02)	Technion
Telatron Marketing Group, Inc. (12-9-02)	Telatron
Telecommunications for the Deaf (11-15-02)	TDI
Teleperformance USA (Julie Loppe-Peyrin; 12-6-02) (Timothy J. Casey; 12-6-02)	Teleperformance
Telestar Marketing, L.P. (11-19-02)	Telestar
Tennessee Regulatory Authority and the Tennesse Attorney General (12-9-02)	TN AG
Texas, Office of Public Utility Counsel (12-9-02)	TOPUC
Texas, Public Utility Commission (12-3-02)	Texas PUC
TSI Telecommunications Services, Inc. (11-7-02)	TSI
U. S. Chamber of Commerce (12-26-02)	Chamber of Commerce
Vector Marketing Corporation (12-9-02)	Vector
Ver-A-Fast (12-10-02) (*see also* Bob Bensman; 11-19-02)	Ver-A-Fast
VeriSign, Inc. (f/n/a Illuminet, Inc.) (3-31-03)	VeriSign
Verizon (12-10-02)	Verizon
Verizon Wireless (12-9-02)	Verizon Wireless
Visa U.S.A. Inc. (12-9-02)	Visa
Wells Fargo & Company (11-5-02)	Wells Fargo
Winnebago Cooperative Telephone Association (1-30-03)	Winnebago
Worldcom, Inc. (12-9-02)	Worldcom

Xpedite Systems, Inc. (12-9-02)	Xpedite
Yellow Pages Integrated Media Association (12-9-02)	Yellow Pages

Reply Comments Filed

Adval Communications, Inc. (1-31-03)	ADVAL
American Teleservices Association (1-31-03) (3-5-03, correction)	ATA
Ameriquest Mortgage Company (1-31-03)	Ameriquest
AT&T Wireless Services, Inc. (1-31-03)	AT&T Wireless
BellSouth Corporation (1-31-03)	BellSouth
Cablevision Systems Corporation (1-31-03)	Cablevision
Cavalier Telephone, LLC (1-31-03)	Cavalier
CMOR (1-31-03)	CMOR
Coontz, J. Greg (1-8-03)	
DialAmerica Marketing, Inc. (1-31-03)	DialAmerica
Direct Marketing Association (1-31-03)	DMA
DIRECTV, Inc. (1-31-03)	DIRECTV
Hershovitz, Marc B., Michael Jablonski, Ned Blumenthal and C. Ronald Ellington (1-8-03) (3 comments)	Hershovitz
The International Softswitch Consortium (1-31-03)	ISC
Intuit, Inc. (1-31-03)	Intuit
LSSi Corp. (Lissi Corp; 1-31-03)	LSSi
Mathemaesthetics, Inc. (1-8-03) (*see also* Douglas McKenna; 1-6-03)	Mathemaesthetics
MBNA America Bank, N.A. (1-31-03)	MBNA
Mortgage Bankers Association of America (Stephen A. O'Conner; 1-31-03)	MBA
National Association of Broadcasters (1-31-03)	NAB
National Association of State Utility Consumer Advocates (NASUCA; 1-31-03)	NASUCA
National Public Radio, Inc. (1-31-03)	NPR
NCS Pearson, Inc. (1-31-03)	NCS
The Newspaper Association of America (1-21-03)	NAA
Nextel Communications, Inc. (1-31-03)	Nextel
Office of the People's Counsel for the District of Columbia (Elizabeth A. Noël, People's Counsel; 1-31-03)	OPC-DC
Private Citizen, Inc. (1-9-03)	Private Citizen

RoperASW (1-30-03)	RoperASW
SBC Communications, Inc. (1-31-03)	SBC
Sytel Limited (2-3-03)	Sytel
Teleperformance USA (4-30-03)	Teleperformance
Vector Marketing Corporation (1-31-03)	Vector
Verizon (1-31-03)	Verizon
Verizon Wireless (1-31-03)	Verizon Wireless
Visa (1-31-03)	Visa
VoltDelta (Brad Schorer; 12-9-02)	VoltDelta
Worldcom, Inc. (1-31-03)	Worldcom
Xpedite Systems, Inc. (1-31-03)	Xpedite
Yellow Pages Integrated Media Association (1-31-03)	Yellow Pages

Further Comments Filed

Active Periodicals, Inc. (5-5-03)	Active Periodicals
Allstate Life Insurance Company (5-5-03)	Allstate
American Association of Retired Persons (AARP; 5-19-03)	AARP
American Council of Life Insurers (5-5-03)	ACLI
American Teleservices Association (5-5-03)	ATA
America's Community Bankers (5-8-03)	ACB
Ameriquest Mortgage Company (5-5-03)	Ameriquest
Bank of America Corporation (Kathryn D. Kohler; 5-2-03)	Bank of America
Bank One Corporation (5-5-03)	Bank One
Cendant Corporation (5-5-03)	Cendant
Citigroup Inc. (5-19-03)	Citigroup
City of Chicago (5-1-03)	City of Chicago
Chrusch, Michael J., Esq. (5-5-03)	
Consumer Council of America (5-5-03)	CCA
Direct Marketing Association (5-5-03)	DMA
DIRECTV, Inc. (5-5-03)	DIRECTV
Electronic Retailing Association (5-5-03)	ERA
Federal Trade Commission (5-12-03)	FTC
Household Bank (SB), N.A. (5-2-03)	Household
InfoCision Management Corporation (5-5-03)	InfoCision
Interactive Teleservices Corporation	ITC
Intuit Inc. (5-5-03)	Intuit

Lorman Education Services (5-5-03)	Lorman
MBNA America Bank, N.A. (5-5-03)	MBNA
Metris Companies Inc. (5-5-03)	Metris
Miller Isar, Inc. (5-2-03)	Miller Isar
Mortgage Bankers Association of America (Kurt Pfotenhauer; 5-5-03)	MBA
National Association of Independent Insurers (National Association of Independent Insures [sic]; 5-5-03)	NAII
National Association of Realtors (National Association of Realtor; 5-5-03)	NAR
National Association of State Utility Consumer Advocates (NASUCA; 5-5-03)	NASUCA
National Association of Insurance and Financial Advisors (5-2-03)	NAIFA
National Telecommunications Cooperative Association (NTCA; 5-5-03)	NTCA
Newspaper Association of America (5-5-03)	NAA
New Jersey State Division of the Ratepayer Advocate (5-5-03)	New Jersey Ratepayer
Nextel Communications, Inc. (5-5-03)	Nextel
Scholastic Inc. (5-5-03)	Scholastic
Securities Industry Association (James Y. Chin; 5-5-03)	SIA
Software & Information Industry Association (5-5-03)	SIIA
Sprint Corporation (5-5-03)	Sprint
Stonebridge Life Insurance Companies (5-5-03)	Stonebridge
Teleperformance USA (4-29-03)	Teleperformance
Tennessee Regulatory Authority (5-5-03)	TN RA
Vector Marketing Corporation (Vector – Marketing Corporation; 4-29-03)	Vector
Verizon (5-5-03)	Verizon
Winstar Communications, LLC (5-5-03)	Winstar
Worldcom, Inc. (5-5-03)	Worldcom
Yellow Pages Integrated Media Association (5-5-03)	Yellow Pages

Further Reply Comments Filed

American Coūncil of Life Insurers (5-19-03)	ACLI
American Teleservices Association (5-19-03)	ATA
America's Community Bankers (5-8-03)	ACB

Ameriquest Mortgage Company (5-5-03)	Ameriquest
Competitive Telecommunications Association (5-19-03)	Competitive Telecom
DialAmerica Marketing, Inc. (5-19-03)	DMA
Indiana Attorney General Steve Carter (5-19-03)	Indiana AG
National Association of State Utility Consumer Advocates (NASUCA; 5-19-03)	NASUCA
New Jersey State Division of the Ratepayer Advocate (5-19-03)	New Jersey Ratepayer
Primerica Financial Services, Inc. (5-19-03)	Primerica
SBC Communications, Inc. (SBC Communications Inc.; 5-19-03)	SBC
Verizon (5-5-03)	Verizon

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278

Our decision today is the most sweeping consumer protection measure ever adopted by the FCC.No longer will consumers be forced to endure unwanted telephone calls and faxes. Under the Telephone Consumer Protection Act (TCPA) and our revised rules, consumers are empowered to choose.

The TCPA is about tools. It gives consumers the tools they need to build a high and strong fence around their homes to protect them from unsolicited telephone calls and faxes. It also allows other consumers to have a lower fence or no fence at all, if they wish to take advantage of these commercial messages. Our decision makes the American consumer's tool-box more complete by creating a national do not call list and strengthening and modifying our other longstanding protections under the TCPA. Our goal: to maximize consumers' ability to control the messages they receive on their personal phones and faxes.

Since the enactment of the TCPA a decade ago, the rapid growth of technology has led to a five-fold increase in marketing contacts via telephone. An increased number of telemarketing calls, the proliferation of predictive dialers, and the incomplete protections of less-comprehensive do not call lists have combined to necessitate the Commission's new approach. Consumers want more control over their telephones–today we give it to them.

In addition to the national do not call list, our decision contains a number of other important provisions. First, although telemarketing calls made pursuant to an existing business relationship are exempt under the TCPA, the Commission today significantly narrows the scope of that

exemption to better protect consumers. Consumers may eliminate even these commercial calls upon request. Second, we tighten the limitations on our existing do not call rules and impose additional requirements on predictive dialers, pre-recorded messages, and calls to wireless phones. We also require telephone solicitations to provide caller identification. Finally we adopt stricter rules to control unsolicited fax advertising. Taken together and combined with vigilant enforcement, our rules provide consumers with the tools they need to craft the commercial relationships they want.

Consistent with the instructions in the recently enacted Do Not Call Implementation Act, our order maximizes consistency and complements the FTC's recently amended rules. I look forward to working with the FTC, under the fine leadership of Chairman Muris, to harmonize our rules and move forward with nation-wide implementation of the federal Do-Not-Call Registry.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order

Today's decision to establish a national do-not-call list is directly responsive to consumer frustration with telemarketing overload. Consumers are fed up with the barrage of telemarketing calls that intrude on their privacy, and they crave the ability to just say no. Congress also has made clear the importance of giving consumers a more effective means of blocking unwanted calls. Congress authorized establishment of a national do-not-call registry in the Telephone Consumer Protection Act of 1991, and earlier this year, it enacted the Do-Not-Call Implementation Act. This legislation authorizes funding for the Federal Trade Commission's national registry and directs this Commission to "maximize consistency" with the FTC's Telemarketing Sales Rule. Today's action responds to this congressional direction by providing a convenient, one-stop solution that will enable consumers to place their phone numbers on a unified national do-not-call list at no charge.

At the same time, I remain mindful that telemarketing can serve a valuable function by providing information to consumers about goods and services. Many consumers appreciate learning about ways to save money, obtain better service, or otherwise take advantage of commercial opportunities. Moreover, telemarketers enjoy protection under the First Amendment, which requires that any restrictions on commercial speech advance a substantial governmental interest and be no more extensive than necessary. Accordingly, I am pleased that we have crafted rules that balance the competing interests at stake.

In particular, we have preserved and in some cases modified the exemptions for calls to consumers with whom the marketer has an established business relationship, calls to consumers who have expressly consented to being called, and calls by tax-exempt nonprofit organizations (or by independent telemarketers calling on their behalf). Consumers should understand that, as a result of these statutory exemptions, placing a phone number on the national do-not-call list will not necessarily mean that you will receive *no* telemarketing calls. But the small number of calls received should be more consistent with consumers' expectations of privacy, and consumers can prohibit any further contact through company-specific do-not-call lists.

I am also pleased that the Commission has established a narrow exemption from the national do-not-call list to permit marketers to contact people with whom they have a personal relationship. I believe the record shows that Congress was concerned about anonymous calls using autodialers; it did not intend to put the Avon Lady out of business. Consumers generally expect and welcome calls from family, friends, and acquaintances who want to promote products and services. Restricting such calls therefore would impose a more extensive burden on speech than is necessary to achieve Congress's goals.

In addition, the Order appropriately clarifies the interplay between federal and state telemarketing restrictions. While I support empowering consumers to block unwanted calls, telemarketers should not have to comply with multiple, inconsistent rules. Indeed, Congress clearly called on this Commission and the FTC to establish a uniform federal regime. Thus, the Order appropriately clarifies that, while states may enforce the federal rules and may adopt more restrictive rules for intrastate calls, states generally may not regulate interstate calls.

In sum, I am pleased to support this Order, because it provides effective mechanisms for consumers to restrict unwanted telemarketing calls, while balancing the legitimate interests that companies and individuals have in communicating with customers and potential customers. I expect companies to comply with our new rules, and I look forward to working together with the FTC and state attorneys general to ensure that consumers receive the privacy protection they want and deserve.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket No. 02-278), Report and Order*

Few rights are so fundamental as the right to privacy in our daily lives, yet few are under such frontal assault. Our dinners are disrupted by unwanted phone calls. Our computer accounts are besieged with bothersome spam. Our mailboxes are swollen with advertisements for products, goods and services. We conduct our whole lives against the white noise of commercial solicitation. These intrusions exhaust us, irritate us and threaten our cherished right to be left alone.

Today we have an opportunity to do something about it. We have an opportunity to reinforce our homes against the constant invasion of commercialism and the endless nuisance of unwanted telemarketing calls. At the direction of Congress and through coordinated action with the Federal Trade Commission, we now return a measure of privacy control to citizens. We establish a national Do-Not-Call registry that permits each of us to choose limits on the telemarketing calls we receive. We do this in a way that balances the First Amendment rights of marketers with the right of each individual and every household to determine the scope of permissible intrusion. This decision represents a positive step for all of us, not only as consumers, but as citizens. I am pleased to support it.

I am especially pleased that the rules we adopt are in harmony with those put in place by our allies in this exercise at the Federal Trade Commission. This is consistent with Congress' direction that we "maximize consistency" with the rules adopted by our fellow agency. This makes for a user-friendly registry.

To ensure that the Do-Not-Call list achieves the protective power and prominence that Congress intended, both agencies must now work together—and with our partners in the states—to enforce the national program we establish here today. When the Do-Not-Call list is open for business, we will share the duty of vigilant enforcement. We worked hard here to balance the rights and privileges of personal contacts and relationships with the right to be left alone. I think we achieve good balance, but I never underestimate the inventiveness of some in skirting or abusing rules, and these individuals and enterprises should understand that such actions will not go unnoticed or unpunished.

We all owe a debt of gratitude to the many people at our Consumer and Governmental Affairs Bureau who worked hard to draft and coordinate and bring this item before the Commission and who will continue to labor on behalf of the American people to implement the rules and make the national registry a success. I also want to commend my colleagues for the productive discussions we have had on this item in recent days. The result is a little more privacy in our not-so-private society.

SEPARATE STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket 02-278).

I am pleased to support this item. By adopting a National Do-Not-Call List, we arm American consumers with a powerful tool to protect their privacy. This is one of the most significant things that the FCC has ever done for American families. It will benefit consumers on a daily basis and in a very personal way. It's certainly the thing that people will notice as much as anything else we have done. We're restoring peace and quiet around the dinner table for everyone who asks for it, and plenty will ask, myself included. The public has sent a resounding directive telling us that uninvited telephone solicitations are not merely a distraction but are driving customers away from their phones. Consumers have also made clear that our prior rules–without a national Do-Not-Call List–do not work to their satisfaction. And Congress has made its wishes clear by adopting the Do-Not-Call Act which authorized the establishment of the national list. My hope is that our actions here will allow the American public to once again view their phones as a useful connection to the world rather than a source of nightly harassment.

At the same time, we balance the interests of consumer privacy alongside the commercial speech interests of those businesses who use the telephone to offer goods and services and the interests of those consumers willing to receive such offers. The record bears out that many consumers find telephone solicitations valuable. According to industry estimates, outbound telemarketing generates between 300 and 600 billion dollars in annual revenues. So, I am sensitive to the potential impact of these rules on the businesses that rely on telephones to reach their customers. I have particular concern about the local telephone industry, where the practical effect of our established business relationship exemption

may have an uneven impact on competitors. Nonetheless, Congress has captured the will of the people–certainly, as reflected in our record–when it directed us to "maximize the consistency" of our rules with the newly-adopted FTC national list. Congress did not explicitly provide for particular treatment of the local telephone industry in the Do-Not-Call Act, but I believe that this area warrants our special attention and monitoring.

So that our rules are no more extensive than necessary and because American consumers each hold different views about the value of telephone solicitations, we adopt a suite of options from which customers can choose the approach that best serves their needs. Under our rules, customers may sign up for the new national Do-Not-Call List or, alternatively, may continue to receive telemarketing calls and sign up for the company-specific lists when they no longer wish to hear from a particular company. When customers sign up for the national list, they still have the ability to grant express permission to receive calls from particular companies. So our rules are flexible enough to allow consumers to choose the best option for them.

We have a special obligation to remain vigilant in our implementation of these rules. Congress has asked us to report to it annually. I look forward to those reports with the optimism that we have adopted measures that will put American consumers back in control of their phones.

APPENDIX J

Before the
Federal Communications Commission
Washington, D. C. 20554

CG Docket No. 02-278
CC Docket No. 92-90

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.

NOTICE OF PROPOSED RULEMAKING AND MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2002 Released: September 18, 2002

Comment Date: 45 days after publication in the Federal Register Reply Comment Date: 60 days after publication in the Federal Register

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements.

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I. INTRODUCTION

1. In 1992, the Commission adopted rules pursuant to the Telephone Consumer Protection Act of 1991 (TCPA)[1] that restricted unsolicited advertising using the telephone and facsimile machine.[2] Since that time, telemarketing practices have changed significantly. New technologies have emerged that allow telemarketers[3] to better target potential customers and make it more cost effective to market using telephones and facsimile machines. At the same time, these new telemarketing techniques have increased public concern about the effect on consumer privacy. In addition, since the Commission adopted its TCPA rules, the number of telecommunications consumers that pay for receiving calls and messages has dramatically increased with the growth of commercial wireless services.[4] Congress provided in the TCPA that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[5] In this Notice of Proposed Rulemaking (NPRM), we seek comment on whether the Commission's rules need to be revised in

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[1] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U. S. C. § 227. The TCPA amended Title II of the Communications Act of 1934; 47 U.S.C. § 201 *et seq*.

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*TCPA Order*).

[3] In this NPRM, the term "telemarketer" refers to any person or entity making a telephone solicitation or using the telephone network to deliver an unsolicited advertisement (regardless of the precise means used to place such a call).

[4] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Seventh Report, FCC 02-179, rel. July 3, 2002, at C- 2 (*2002 CMRS Competition Report*).

[5] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

order to more effectively carry out Congress's directives in the TCPA. Specifically, we seek comment on whether to revise or clarify our rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. We also seek comment on the effectiveness of company-specific do-not-call lists. In addition, we seek comment on whether to revisit the option of establishing a national do-not-call list and, if so, how such action might be taken in conjunction with the Federal Trade Commission's (FTC) proposal to adopt a national do-not-call list and with various state do-not-call lists.[6] In considering ways in which we might improve our TCPA rules, we seek to enhance consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators. Finally, in the Memorandum Opinion and Order, we close and terminate CC Docket No. 92- 90 and open a new docket in which we will consider the issues raised in this proceeding.

II. NOTICE OF PROPOSED RULEMAKING IN CG DOCKET 02- 278

A. BACKGROUND

1. Telephone Consumer Protection Act

2. On December 20, 1991, Congress enacted the TCPA in an effort to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety.[7] The statute restricts the use of automatic telephone dialing systems, artificial and prerecorded messages, and

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[6] *See Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492 (January 30, 2002) (*FTC Notice*).

[7] *See TCPA*, Section 2(5), *reprinted in* 7 FCC Rcd 2736 at 2744.

telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA provides that:

> It shall be unlawful for any person within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> (i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
>
> (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);
>
> (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi- line business are engaged simultaneously.[8]

Under the TCPA, those sending fax messages or transmitting artificial or prerecorded voice messages are subject to certain identification requirements.[9] The statute also provides consumers with several options to enforce the restrictions on unsolicited telemarketing, including a private right of action.[10]

3. The TCPA requires the Commission to prescribe regulations to implement the statute's restrictions on the use of

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[8] 47 U.S.C. § 227(b)(1).

[9] 47 U.S.C. §§ 227(d)(1)(B) and (d)(3) A). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92- 90, Order on Further Reconsideration, 12 FCC Rcd 4609, 4613, para. 6 (1997) (*1997 TCPA Reconsideration Order*), in which the Commission found that "[s]ection 227(d)(1) of the statute mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message and not the entity that transmits the message."

[10] The TCPA permits consumers to file suit in state court if an entity violates the TCPA prohibitions on the use of facsimile machines, automatic telephone dialing systems, and artificial or prerecorded voice messages and telephone solicitation. 47 U.S.C. §§ 227(b)(3) and (c)(5). Consumers may recover actual damages or receive up to $500 in damages for each violation, whichever is greater. If the court finds that the entity willfully or knowingly violated the TCPA, consumers may recover an amount equal to not more than three times this amount. 47 U.S.C. § 227(b)(3)(C). Consumers may also bring their complaints regarding TCPA violations to the attention of the state attorney general or an official designated by the state. This state entity may bring a civil action on behalf of its residents to enjoin a person or entity engaged in a pattern of telephone calls or other transmissions in violation of the TCPA. 47 U.S.C. § 227(f)(1). Additionally, a consumer may request that the Commission take enforcement actions regarding violations of the TCPA and the regulations adopted to enforce it. *See* 47 C.F.R. § 1.41 on informal requests for Commission action and 47 C.F.R. § 1.716 on the Commission's process for complaints filed against common carriers.

autodialers, artificial or prerecorded messages and unsolicited facsimile advertisements.[11] The TCPA also requires the Commission to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights" and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.[12] Specifically, section 227(c)(1) requires the Commission to "compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages."[13] The TCPA specifically authorizes the Commission to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations."[14]

2. TCPA Orders

4. In 1992, the Commission adopted rules implementing the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining do-not-call lists.[15] Pursuant to the Commission's rules, a person or entity engaged in telemarketing is required to maintain a record of a called party's request not to receive future solicitations for a period of ten years.[16] Telemarketers

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[11] *See* 47 U.S.C. § 227(b)(2).

[12] 47 U.S.C. § 227(c)(1)-(4).

[13] 47 U.S.C. § 227(c)(1)(A).

[14] 47 U.S.C. § 227(c)(3).

[15] 47 C.F.R. § 64.1200(e)(2).

[16] Initially telemarketers were required to honor a do-not- call request indefinitely. The Commission later modified its rules to require that the

must develop and maintain written policies for maintaining their lists,[17] and they are required to inform their employees of the list's existence and train them to use the list.[18] Commission rules prohibit telemarketers from calling residential telephone subscribers before 8 a.m. or after 9 p.m.[19] and require telemarketers to identify themselves to called parties.[20] As mandated by the TCPA, the Commission's rules also establish general prohibitions against autodialed calls being made without prior express consent to certain locations, including emergency lines or health care facilities,[21] the use of prerecorded or artificial voice message calls to residences,[22] line seizure by prerecorded messages,[23] and the transmission of unsolicited advertisements by facsimile machines.[24] The TCPA rules provide that facsimile and prerecorded voice transmissions, as well as telephone facsimile machines, must meet specific identification requirements.[25]

5. In adopting rules to implement the TCPA, the Commission declined to create a national database of telephone subscribers who do not wish to receive calls from tele-

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request be honored for a ten- year period. *See Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397-98, para. 15 (1995) (*1995 TCPA Reconsideration Order*); 47 C.F.R. § 64.1200(e)(2)(vi).

[17] 47 C.F.R. § 64.1200(e)(2)(i).

[18] 47 C.F.R. § 64.1200(e)(2)(ii).

[19] 47 C.F.R. § 64.1200(e)(1).

[20] 47 C.F.R. § 64.1200(e)(2)(iv).

[21] 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

[22] 47 C.F.R. § 64.1200(a)(2).

[23] 47 C.F.R. §§ 64.1200(a)(4) and 68.318(c).

[24] 47 C.F.R. § 64.1200(a)(3).

[25] 47 C.F.R. §§ 64.1200(d)(1) and (2); 47 C.F.R. § 68.318(d).

marketers.[26] In particular, the Commission noted that such a database would be costly, difficult to maintain in an accurate form, and might jeopardize the security of telemarketer proprietary information and the privacy of telephone subscribers who paid to have unpublished or unlisted numbers.[27] As explained above, the Commission opted instead to implement an alternative scheme—one involving company-specific do-not-call lists. The Commission determined that rules requiring commercial telemarketers to maintain their own lists of consumers who do not wish to be called sufficiently balanced consumers' privacy interests with Congress's instruction that telemarketing practices not be unreasonably hindered.[28]

6. In 1995 and 1997, the Commission released orders addressing petitions for reconsideration of the TCPA Order. In a Memorandum Opinion and Order released on August 7, 1995, the Commission exempted from its TCPA rules calls made on behalf of tax- exempt nonprofit organizations and by collection agencies, and required telemarketers to honor a do-not-call request for a period of ten years.[29] The Commission also extended its TCPA rules to accommodate technical advances in computer-based facsimile modems that enable solicitors to become "fax broadcasters."[30] On April 10, 1997, the Commission issued an Order on Further Reconsideration requiring that all facsimile transmissions contain the identifying information of the business, other entity, or individual

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[26] *TCPA Order*, 7 FCC Rcd at 8760-61, paras. 14-15.

[27] *TCPA Order*, 7 FCC Rcd at 8758-61, paras. 11-15.

[28] *TCPA Order*, 7 FCC Rcd at 8763-67, paras. 20-24.

[29] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397-98, paras. 12-15.

[30] *Id.* at 12404-06, paras. 27-31.

creating or originating the facsimile message, rather than the entity that transmits the message.[31]

3. Marketplace Changes Since 1992

7. The marketplace for telemarketing has changed significantly in the last decade. When the TCPA was enacted in 1991, Congress determined that 300,000 solicitors were used to telemarket goods and services to more than 18 million Americans every day.[32] Congress also found that in 1990 sales generated through telemarketing amounted to $435 billion dollars.[33] Some estimate that today telemarketers may attempt as many as 104 million calls to consumers and businesses every day,[34] and that telemarketing calls generate over $600 billion in sales each year.[35] The telemarketing industry is considered the single largest direct marketing system in the country, representing 34.6% of the total U. S.

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[31] *1997 TCPA Reconsideration Order*, 12 FCC Rcd 4619. The Commission also "[did] not find anything in the TCPA to prohibit a facsimile broadcast provider from supplying identification of itself and the entity originating a message if it arranges with the message sender to do so." *Id.* at 4613, para. 6.

[32] *See TCPA*, Section 2(3), *reprinted in* 7 FCC Rcd 2736 at 2744.

[33] *See* TCPA, Section 2(4), *reprinted in* 7 FCC Rcd 2736 at 2744.

[34] In attempting to estimate the number of outbound marketing calls made each day in the United States, representatives of the Direct Marketing Association (DMA) have stated that, with as many as 1 million telemarketing representatives making 13 calls an hour, working 8 hours a day, it is possible that 104 million outbound calls are made to businesses and consumers every day. They noted that, of these calls, as many as 41% of them may be abandoned (because they get busy signals, no answer, hang- ups, or answering machines). *See* transcript from FTC Do-Not-Call Forum, June 6, 2002 at 68-69.

[35] This figure represents telemarketing sales to consumers and businesses. *See* Seth Stern, *Will feds tackle telemarketers?* (visited May 8, 2002) (citing Direct Marketing Association statistics), <http:// www.csmonitor.com/2002/0415/ p16s01-wmcn.html>.

sales attributed to direct marketing.[36] The number of telemarketing calls, along with the increased use of various technologies to contact consumers, has heightened public concern about unwanted telemarketing calls and control over the telephone network. Autodialers permit telemarketers to deliver prerecorded messages to thousands of potential customers every day. Predictive dialers,[37] which initiate phone calls while telemarketers are talking to other consumers, frequently abandon calls before a telemarketer is free to take the next call.[38] Using predictive dialers allows telemarketers to devote more time to selling products and services rather than dialing phone numbers, but the practice inconveniences and aggravates consumers who are hung up on. Despite a general ban on faxing unsolicited advertisements,[39] and aggressive enforcement by the Commis-

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[36] *See* The Economic Impact of Direct Marketing by Telephone, a study presented by Direct Marketing Association Telephone Marketing Council, <http:// www. third-wave.net/economics.htm> (visited July 3, 2002).

[37] A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers the phone only to hear "dead air" because the dialer simply hangs up when no telemarketer is free to take the call. *See FTC Notice*, 67 Fed. Reg. at 4522.

[38] Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate (*i.e.*, the percentage of hang- up calls the system will allow). The higher the abandonment rate, the higher the number of hang- up calls. High abandonment rates increase the probability that a customer will be on the line when the telemarketer finishes each call. It also, however, increases the likelihood that the telemarketer will still be on a previously placed call and not be available when the consumer answers the phone.

[39] 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(3).

sion,[40] faxed advertisements also have proliferated, as facsimile service providers (or "fax broadcasters") enable sellers to send advertisements to multiple destinations at relatively little cost. These unsolicited faxes result in substantial inconvenience and disruption and also may have serious implications for public safety.[41]

4. TCPA Inquiries and Complaints

8. This NPRM is prompted, in part, by the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements. Many of these questions involve how the Commission's rules

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[40] The Commission or the Commission's Enforcement Bureau have issued forfeiture orders totaling $1.56 million for violations of the TCPA's prohibitions on unsolicited faxes, and we have most recently proposed a $5,379,000 forfeiture against a fax broadcaster. *See Fax. com, Inc. Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, FCC 02-226 (rel. Aug. 7, 2002) (Fax. com NAL) (finding Fax. com apparently liable in the amount of $5,379,000 for sending 489 unsolicited advertisements to telephone facsimile machines), *stayed Missouri v. American Blast Fax*, No. 4: 00CV933SNL (E. D. Mo. Aug. 29, 2002). The Enforcement Bureau has also issued 173 junk fax citations and 18 citations for unlawful prerecorded messages sent to residential telephone lines. Prior to the formation of the Commission's Enforcement Bureau, the Common Carrier Bureau issued 9 additional citations against companies for violations of the TCPA's unsolicited fax rules. For a description of the Commission's enforcement actions involving the TCPA, see http://www.fcc.gov/eb/tcd/working. html. Under Section 503 of the Act, the Commission is required in an enforcement action to issue a warning citation to any non-licensee as an initial matter. Only if the non-licensee subsequently engages in conduct described in the citation may the Commission propose a forfeiture. The forfeiture may only be issued as to the subsequent violations. See 47 U.S.C. §§ 503(b)(5), (b)(2)(C).

[41] *See, e.g., Fax. com NAL*, para. 9, which describes a medical doctor's complaint about unsolicited fax advertisements he received on a line that is reserved for the receipt of patient medical data.

apply to more-widely used technologies such as caller ID,[42] predictive dialers, and different types of automatic dialing equipment. Consumers and industry representatives alike have also inquired about the exemptions for nonprofit organizations and businesses with which consumers have an established relationship. In the last two years alone, the Commission's Consumer & Governmental Affairs Bureau (CGB) has received over 26,900 TCPA-related inquiries[43] and over 11,000 complaints[44] about telemarketing practices. According to CGB's most recent Quarterly Report, in the wireline category, the top area of complaint after only billing and rates was compliance with the TCPA.[45] Additionally, in 2001, the Commission received over 2,100 complaints about unsolicited advertisements sent to fax machines.[46] In February 2002, the Commission's revised fact sheet titled "Unwanted Telephone Marketing Calls" received over 162,000 hits on the Commission's website (the second "most popular" fact sheet that month was "Charges on Your Phone Bill" with 5, 422 hits).[47]

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[42] *See* 47 C. F. R. § 64. 1600 *et seq*. For an explanation of the Commission's caller ID rules, *see infra* n. 104.

[43] These inquiries were received during the period June 2000 through December 2001.

[44] This figure includes complaints received during the period January 2000 through December 2001.

[45] The Commission received 1,385 such complaints in the third quarter of FY 2002 (April-June, 2002). In addition, the Commission received 6, 994 TCPA-related inquiries in the third quarter of FY 2002. *See* Consumer & Governmental Affairs Bureau Quarterly Report, 3rd Quarter, FY 2002 (rel. July 29, 2002).

[46] Five years earlier, in 1996, the Commission received 519 complaints on unsolicited faxes.

[47] Source: The Commission's Consumer & Governmental Affairs Bureau (CGB).

5. State Do-Not- Call Lists and FTC's Proposed Rules

9. A growing number of states have passed or are considering legislation to establish statewide do-not-call lists.[48] Such state lists vary widely in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions. Some state statutes provide for state-managed do-not-call lists, while others require telemarketers to use the Direct Marketing Association's Telephone Preference Service.[49] In some states, residents can register for the do-not-call lists at no charge.[50] In others, telephone subscribers must pay a fee. For example, Georgia requires its residents to pay $5 to place their phone numbers

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[48] Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Maine, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Wyoming have Do-Not-Call databases in effect; California, Colorado, Louisiana, Pennsylvania, and Wisconsin are presently implementing database systems. Legislation proposing Do-Not-Call databases has been offered during the current legislative sessions in Alaska, Arizona, Iowa, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, and Washington. *See* Comments and Recommendations of the Attorneys General of Alabama et al. filed with the FTC at 4, n. 1 and 2.

[49] *See, e. g.*, Wyoming (Wyo. Stat. Ann. § 40-12-301) and Maine (Me. Rev. Stat. § 4690-A). The Direct Marketing Association (DMA) is a trade association of businesses that advertise their products and services directly to consumers by mail, telephone, magazine, internet, radio or television. Established in 1985, the DMA's Telephone Preference Service (TPS) is a list of residential telephone numbers for consumers who do not wish to receive telemarketing calls. The DMA requires its members to adhere to the list. Telemarketers who are not members of DMA are not required to use the list, but may purchase the TPS for a fee. *See* <http://preference.the-dma.org/subscribe.php> (accessed July 3, 2002).

[50] *See, e.g.*, Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Indiana (H. B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Missouri (Mo. Rev. Stat. § 407.1098); and Tennessee (Tenn. Code Ann. § 65-4-401; see also rules at Tenn. Comp. R & Regs. Chap. 1220-4-11).

on the do-not-call list for a period of two years.[51] To register with the Texas do-not-call list, residents must pay $2.25 for three years.[52] In most states, telemarketers must obtain a copy of the state do-not-call list if they wish to call residents in that state; however, such access fees vary from state to state. In Oregon, telemarketers must pay $120 per year to obtain the state do-not-call list;[53] in Missouri, the fee is $600 per year, although telemarketers can pay less if they want only numbers from certain area codes.[54] The state "do-not-call" statutes provide numerous and varying exceptions to their requirements. Nevertheless, state do-not-call lists appear to have been a popular government initiative. In Missouri, more than one million residential telephone numbers have been placed on the state's do-not-call list since it went into effect last July.[55] In Indiana, more than one million residential telephone numbers have been submitted to the state's do-not-call list. And, in New York, two million residential telephone numbers are enrolled on the do-not- call list.[56]

10. On January 22, 2002, the FTC released a Notice of Proposed Rulemaking in which it proposed amending its Telemarketing Sales Rule.[57] Noting changes in the way

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[51] *See* Ga. Code Ann. § 46-5-17; *see also* rules at Ga. Comp. R & Regs. R. 515-14-1.

[52] *See* H. B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001.

[53] *See* Or. Rev. Stat. § 464.567.

[54] *See* Mo. Rev. Stat. § 407.1098.

[55] *See Missouri No Call Tops 1 Million Three Days Before One- Year Anniversary of Law*, Office of Missouri Attorney General, June 28, 2002, <http://www.ago.state.mo.us/062802.htm>.

[56] *See* David Wessel, *On Hold: Gagging the Telemarketers*, Wall Street Journal, April 11, 2002 at A2. *See also*, Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 4, n. 3.

[57] *See FTC Notice*, 67 Fed. Reg. 4492 (January 30, 2002). The FTC adopted its Telemarketing Sales Rule, 16 C.F.R. Part 310, on August 16,

telemarketing is conducted and an increase in consumer demand for greater privacy, the FTC proposed additional restrictions on telemarketers, including additional disclosure requirements, prohibitions on certain billing practices, and prohibitions on the blocking of caller ID. The FTC also proposed creating a national do-not-call database that it would maintain. The FTC acknowledged that certain entities, including banks, credit unions, savings and loans, common carriers, nonprofit organizations and insurance companies, would not be covered by the proposed rules because they are specifically exempt from coverage under the FTC Act.[58]

B. DISCUSSION

11. It has been nearly ten years since the Commission adopted a broad set of rules to curb unwanted telephone solicitations in the *TCPA Order*. In this NPRM, we seek to review the practices used to market goods and services over the telephone and facsimile machine that are the focus of the TCPA and the Commission's implementing regulations. In doing so, we ask whether the Commission should: 1) refine its existing rules on the use of autodialers, prerecorded messages, and unsolicited facsimile advertisements, to

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1995, pursuant to the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108. The Telemarketing Act, which was signed into law on August 16, 1994, directed the FTC to issue a rule prohibiting deceptive and abusive telemarketing acts or practices. *Id.* at 4492-93.

[58] *See* 15 U.S.C. § 45(a)(2); *see also FTC Notice*, 67 Fed. Reg. at 4493. In its Notice, the FTC explains that, while nonprofit organizations are not covered by its Telemarketing Sales Rule because they are specifically exempt from coverage under the FTC Act, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA Patriot Act") of 2001, Pub. L. 107-56 (Oct. 25, 2001) "amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fund raising conducted by for-profit telemarketers for or on behalf of charitable organizations."

account for technological developments in recent years and emerging telemarketing practices; 2) adopt any additional rules as permitted by the statute to ensure that our telemarketing requirements protect the privacy of individuals and permit legitimate telemarketing practices[59]; and 3) reconsider the option of establishing a national do-not-call list as authorized by Congress in the TCPA. On the subject of a national do-not-call list, we are particularly interested in comments addressing those entities not covered by the FTC's proposed national do-not-call database as well as the interplay between a national registry and state do-not-call lists. We request that commenters address issues relating to our current rules separately from those issues relating to a national do-not-call list.

12. In evaluating the issues in this NPRM, we will be mindful of the constitutional standards applicable to governmental regulations of commercial speech articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*.[60] In order to determine whether restrictions on commercial speech survive "intermediate scrutiny," *Central Hudson* sets out a four- part test.[61] *Central Hudson* asks first whether the speech in question concerns illegal activity or is misleading, in which case the government may freely regulate the speech. If the speech is not misleading and does not involve illegal activity, the court applies the rest of the four-part test to the government's regulation. The second prong of *Central Hudson* examines whether the government has a substantial interest in regulating the speech. Third, the government must show that the restriction on commercial speech directly and materially advances that interest. Finally,

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[59] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

[60] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U. S. 557 (1980) (*Central Hudson*).

[61] *Central Hudson*, 447 U. S. at 564-65.

the regulation must be narrowly tailored. Narrowly tailored means that the government's restriction on speech reflects a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition."[62] To the extent that any proposed changes to our current rules implicate these constitutional standards, we seek comment on such implications.

1. TCPA Rules

a. Company- Specific Do- Not- Call Lists

13. The TCPA directs the Commission to "compare and evaluate alternative methods and procedures . . . for their effectiveness in protecting [residential telephone subscribers'] privacy rights" to avoid receiving unwanted telephone solicitations.[63] In the *TCPA Order*, the Commission determined that rules requiring telemarketers to maintain their own lists of consumers who did not wish to be called sufficiently balanced consumer interests in limiting unsolicited advertising with telemarketers' interests in providing beneficial services to consumers.[64] The company-specific do-not-call approach protects residential telephone subscriber privacy by requiring telemarketers to place a consumer on a do-not-call list if the consumer asks not to receive further solicitations.[65]

14. We now seek comment on the overall effectiveness of the company-specific do-not-call approach in providing consumers with a reasonable means to curb unwanted telephone solicitations. We recognize that some consumers may feel that receiving product and service information by telephone helps them reap the benefits of a competitive

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[62] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks omitted).

[63] 47 U.S.C. § 227(c)(1)(A).

[64] *TCPA Order*, 7 FCC Rcd at 8765-66, para. 23.

[65] 47 C.F.R. § 64.1200(e)(2)(iii).

marketplace; such consumers may value the savings and convenience that telemarketing often provides. Other consumers may wish to limit, or even stop altogether, the number of telemarketing calls they receive. Given the volume of telemarketing calls, we seek comment on whether the company-specific do-not-call approach adequately balances the interests of those consumers who wish to continue receiving telemarketing calls, and of the telemarketers who wish to reach them, against the interests of those who object to such sales calls. We note that, under the company-specific do-not-call approach, consumers must repeat their request not to be called on a case-by-case basis as calls are received. We seek comment on whether this approach is unreasonably burdensome for consumers. We also seek comment on how effective such requests have been in practice in preventing unwanted telephone solicitations.[66] For example, we seek comment on whether such requests are typically honored, whether consumers continue to receive calls for some period of time after requesting that they be placed on a do- not- call list, and whether some telemarketers hang up before consumers can assert their "do-not-call" rights. In addition, we seek comment on whether consumers with hearing and speech disabilities often may be unable to convey a request not to be called to telemarketers.[67]

15.As discussed above, changes in the marketplace and technological innovations since the Commission adopted its

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[66] The U. S. Department of Justice has indicated that maintenance of a purely voluntary list by industry, or of separate do-not-call lists by various states, has not proven effective for consumers in ensuring that they will not receive unwanted telemarketing calls. *See* U.S. Department of Justice Comments filed in the FTC proceeding dated March 29, 2002 at 4.

[67] *See* Telecommunications for the Deaf, Inc. Comments in the FTC proceeding dated April 15, 2002 at 2 (indicating that these consumers often receive calls from telemarketers that are not equipped to handle TTY calls).

TCPA rules in 1992 may have reduced the effectiveness of the company-specific approach. For example, the widespread use of predictive dialers and answering machine detection technology results in many "hang- up" or "dead air" calls in which the consumer has no opportunity to request that the telemarketer not call in the future.[68] The FTC indicates that use of predictive dialers has increased dramatically in the past decade.[69] The FTC notes that many consumers feel frightened, threatened, or harassed when receiving a pattern of such hang-up calls.[70] In addition, there is no way for the consumer to determine whether such calls are placed by telemarketers or may be part of some illegitimate conduct. Such calls may also be particularly trying for the elderly and persons with disabilities who may have difficulty reaching the phone only to be disconnected. Such calls may also be disruptive to the increasing number of individuals who now work from home by tying up telephone lines or disconnecting telecommuters from the Internet.[71] We seek comment on what, if any, legitimate business or commercial speech interest is promoted by these calls. We seek comment on these issues and any other impact that changes in the telemarketing industry over the last decade have had on the overall effectiveness of the company- specific approach.

16. In the *TCPA Order*, the Commission enumerated a number of advantages both to consumers and businesses in

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[68] *See supra* n. 37 and 38.

[69] *FTC Notice*, 67 Fed. Reg. at 4523.

[70] *FTC Notice*, 67 Fed. Reg. at 4523.

[71] The number of Americans who work off- site has dramatically increased since 1990, when there were 3.4 million telecommuters in the United States. In 1999, almost 20 million people in the United States telecommuted. This figure represents an 80% increase from 1997, when there were 11.1 million telecommuters nationally. *See General Telecommuting Questions*, Midwest Institute for Telecommuting Education (MITE) (visited April 16, 2002) <http:// www.mite.org/>.

adopting a company-specific do-not-call approach. In particular, the Commission concluded that company-specific do-not-call lists: (1) were already maintained by many telemarketers; (2) allow residential subscribers to selectively halt calls from telemarketers; (3) allow businesses to gain useful information about consumer preferences; (4) protect consumer confidentiality because the lists would not be universally accessible; and (5) impose the costs of protecting consumers on telemarketers rather than telephone companies or consumers.[72] We seek comment on whether these and any other potential advantages of the company-specific do-not-call approach remain valid today. In addition, we seek comment on whether the company- specific approach should be retained if the FTC, either acting alone or in conjunction with the Commission, adopts a national do-not-call list. Under such circumstances, we seek comment as to whether the benefits of retaining company- specific do-not-call lists to consumers would continue to outweigh the costs to telemarketers. Parties are strongly encouraged to provide empirical studies or other specific evidence whenever possible to support their arguments.

17. If the Commission concludes that it should retain the company-specific do-not-call lists, we seek comment on whether the Commission should consider any additional modifications that would allow consumers greater flexibility to register on such lists. For example, we seek specific comment on whether companies should be required to provide a toll-free number and/or a website that consumers can access to register their name on the do-not-call list. In addition, we seek comment on whether any additional measures should be taken to ensure that consumers with disabilities have the same opportunity as other consumers to request that they be placed on do-not-call lists. We also seek

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[72] *TCPA Order*, 7 FCC Rcd at 8765-66, para. 23.

comment on whether companies should be required to respond affirmatively to such requests or otherwise provide some means of confirmation so that consumers may verify that their requests have been processed. As a related matter, we seek comment as to whether the Commission should set a specific time frame for companies to process do-not-call requests. We also ask whether the requirement that companies honor do-not-call requests for ten years is a reasonable length of time for consumers and telemarketers.[73] In addition, we seek comment on any possible Commission or industry initiatives that would better inform consumers of their right to request placement on a company's do- not- call list. We also seek comment on the effectiveness of any private sector initiatives, such as the Direct Marketing Association's Telephone Preference Service, in reducing unwanted sales calls.[74] Are there any industry "best practices" that might provide telemarketers with possible safe harbors from liability for violating our do-not-call rules? Finally, we seek comment on whether our rules should be modified to minimize unnecessary burdens on telemarketers. We seek comment on these and any other modifications that commenters may suggest that would better balance the goal of limiting unsolicited advertising against telemarketers' burdens in conducting beneficial or otherwise legitimate telemarketing practices.

18. *Interplay of sections 222 and 227.* The Commission has recently released an Order implementing section 222 of the Communications Act of 1934, as amended.[75] Section 222,

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[73] In its 1995 Order, the Commission stated that it would monitor the effectiveness of the 10-year retention requirement and readdress the issue if necessary at a later date. *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12398, para. 15.

[74] *See supra* n. 49.

[75] *See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report

entitled "Privacy of Customer Information," obligates telecommunications carriers to protect the confidentiality of certain information. In the *CPNI Order*, the Commission determined that a telecommunications carrier may use a customer's customer proprietary network information (CPNI)[76] to market various services to a customer if that customer has provided its carrier with appropriate consent.[77] The section 227 rules require telemarketers to maintain their lists of consumers who do not wish to be called and to place a consumer on a do-not-call list if the consumer asks not to receive further solicitations.[78]

19. We seek comment broadly on the interplay between sections 222 and 227. For example, if an individual places her name on her carrier's do-not-call list under section 227 (or a national do-not-call list, if one were implemented), should such an express request not to be contacted by means of the telephone be honored even though the customer may also have provided implied (opt-out) consent under section 222 for use and disclosure of her CPNI? We believe that a consumer's request to be placed on a telecommunications carrier's do-not-call list limits that carrier's ability to market to that consumer over the telephone. The carrier, however,

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and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214, (rel. July 25, 2002) (*CPNI Order*).

[76] CPNI includes personal information such as the phone numbers called by a consumer, the length of phone calls, and services purchased by the consumer, such as call waiting. *See CPNI Order*, para. 7.

[77] The form of consent required varies with the CPNI uses and disclosures for which the carrier requests consent. Under an "opt- out" consent, if the customer fails to expressly advise the carrier that it does not want its CPNI used in the manner requested, then after a minimum thirty-day waiting period from the time notice is provided to the customer, the customer is deemed to have approved the requested use or disclosure.

[78] 47 C.F.R. § 64.1200(e)(iii); *see also* 47 U.S.C. § 227(c).

may still market to that consumer, using her CPNI, in other ways (e.g., direct mail, email, etc.). Honoring a do not call request under section 227 does not render a consent under section 222 a nullity, but instead merely limits the manner of contact (i.e., marketing over the telephone) consistent with the express request of the customer under section 227. Further, we believe it likely that permitting a section 222 opt-out consent to eliminate or trump a section 227 do not call request would lead to customer confusion concerning privacy rights and the actions required to secure those rights. We request comment on our tentative conclusion, as well as on the rationale underlying that conclusion. We also request comment on whether we should reach that same tentative conclusion where the form of consent provided under section 222 is an express opt- in consent. Commenters should also analyze those constitutional considerations that may influence our determination, and explain with particularity how their recommendations are consistent with first amendment requirements.[79]

20. As discussed below, the Commission's rules permit an exemption for companies to deliver artificial or prerecorded message calls to consumers with whom they have an "established business relationship."[80] The Commission seeks comment on what effect the established business relationship exemption might have on the telecommunications industry, if a national do-not-call list is established. Should we consider modifying the definition of "established business relationship" so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product?

b. Network Technologies

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[79] *See Central Hudson*, 447 U.S. 564-65.

[80] *See infra* para. 34. *See also* 47 C.F.R. § 64.1200(c)(3).

21. We seek comment on whether network technologies have been developed over the last decade that may allow consumers to avoid receiving unwanted telephone solicitations. If so, we seek comment on whether and how these technologies should influence our analysis of the merits of revising our company- specific do-not-call rules or possibly adopting a national do-not-call list. In particular, we seek comment on what factors the Commission should consider in deciding whether to rely on these technologies. In the 1992 TCPA Order, the Commission rejected the network technology method of avoiding unwanted telephone solicitations.[81] In particular, the Commission considered whether to require telemarketers to use a special area code or telephone number prefix that would allow consumers to block such calls using automatic number identification (ANI)[82] or a caller ID service. Based on the costs and technical barriers to implement this alternative, however, the Commission concluded that this solution was not the best means for accomplishing the objectives of the TCPA at that time.[83] The Commission also noted that it was unclear whether fees on telemarketers would be sufficient to cover the costs of making call blocking technology universally available, raising the possibility that such costs would be passed on to residential telephone subscribers, in violation of the TCPA.[84] We seek comment on whether these concerns remain persuasive today. We seek comment on whether we should consider any other tech-

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[81] *TCPA Order*, 7 FCC Rcd at 8761-62, paras. 16-17.

[82] The term "ANI" (automatic number identification) refers to the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users. 47 C.F.R. § 64.1600(b).

[83] *TCPA Order*, 7 FCC Rcd at 8762, para. 17 (noting that the more than 30, 000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers).

[84] *TCPA Order*, 7 FCC Rcd at 8762, para. 17.

nologies in this context, and, if so, we ask commenters to include a brief explanation of how these technologies operate and how much they would cost to implement.

22. Under the Commission's rules, with certain limited exceptions, common carriers using Signaling System 7 (SS7) and offering or subscribing to any service based on SS7 functionality are required to transmit the calling party number (CPN) associated with an interstate call to interconnecting carriers.[85] As discussed in greater detail below, we take this opportunity to seek comment on whether the Commission should consider any additional "caller ID" requirements in the context of its review of the TCPA rules. Specifically, should the Commission require telemarketers to transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information?[86] We also seek comment on what impact any changes to our "caller ID" rules might have on existing state "caller ID" rules.

c. Autodialers

23. *Definition.* Section 227 and the Commission's implementing regulations define automatic telephone dialing systems as "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers."[87] The Commission seeks comment on the definition of "automatic telephone dialing system" (or "autodialer") and whether it is necessary to identify the technologies section 227 is designed to address. The TCPA and Commission's rules prohibit calls

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[85] *See* 47 C. F. R. §§ 64.1600, 64.1601.

[86] *See infra*, para. 26. *See also* 2001 United States House Bill No. 90, 107 th Congress (proposing to amend the Communications Act of 1934 to prohibit telemarketers from interfering with the caller identification service of any person to whom a telephone solicitation is made).

[87] 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64. 1200(f)(1).

using an autodialer to emergency telephone lines, to the telephone line of a guest room of a health care facility, to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.[88] In addition, Commission rules provide that all artificial or prerecorded messages delivered by an autodialer shall, at the beginning of the message, state the identity of the entity initiating the call and, during the message, the telephone number or address of such entity.[89] The Commission has received inquiries about whether certain technologies fall within these restrictions, given that they may or may not be classified as "automatic telephone dialing systems."

24. The legislative history of the TCPA suggests that autodialer-generated calls are more intrusive to the privacy concerns of the called party than live solicitations.[90] An autodialer can generate far more calls to residences than a telemarketer can manually.[91] In addition, an autodialer is frequently used to send artificial or prerecorded messages, which the legislative history suggests are often a greater

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[88] 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64. 1200(a)(1)(i)-(iii).

[89] 47 C.F.R. § 64.1200(d)(1) and (2).

[90] "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall . . . [O]wning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls." 137 CONG. REC. S9874 (July 8, 1991)(statement of Sen. Hollings).

[91] Representative Markey noted that "[t]oday in America, more than 300, 000 solicitors make more than 18 million calls every day in the United States, while some 75,000 stock brokers make 1.5 billion telemarketing calls a year. Automatic dialing machines, on the other hand, have the capacity to call 20 million Americans during the course of a single day, with each individual machine delivering a prerecorded message to 1,000 homes." 137 CONG. REC. H10,341 (Nov. 18, 1991).

nuisance and invasion of privacy than calls placed by "live" persons.[92] We seek comment on this reading of the legislative history and whether Congress intended the definition of "automatic telephone dialing system" to be broad enough to include any equipment that dials numbers automatically, either by producing 10-digit telephone numbers arbitrarily or generating them from a database of existing telephone numbers. The Commission recognizes that in the last decade new technologies have emerged to assist telemarketers in dialing the telephone numbers of potential customers. More sophisticated dialing systems, such as predictive dialers[93] and other electronic hardware and software containing databases of telephone numbers, are now widely used by telemarketers to increase productivity and lower costs. Therefore, we ask commenters to provide information on the various technologies used to dial telephone numbers. We invite comment on the use of random and sequential number generators and whether an autodialer can generate phone calls from a database of existing numbers. If a particular technology generates numbers at random, how does a telemarketer comply with the law to avoid calling emergency phone lines, health care facilities, pager numbers, and wireless telephone numbers? In light of new technologies and the legislative history, is there a need to refine the definition in our rules to better balance the goal of limiting unsolicited advertising against the burdens on telemarketers and their interest in providing beneficial telemarketing services?

25. *Autodialed Calls to Residences and Businesses.* Additionally, the Commission seeks input from commenters about the costs and benefits of adopting rules to further restrict the

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[92] *See* S. REP. NO. 102-178, at 2 (1991). Congress found that complaints about automated calls included the fact that such calls fill the entire tape of an answering machine, thereby preventing the called party from receiving other messages from other callers.

[93] *See supra* text accompanying note 37.

use of autodialers to dial residential and business telephone numbers. We specifically seek comment on the practice of using automatic telephone dialing equipment to dial large blocks of telephone numbers in order to identify lines that belong to telephone facsimile machines.[94] Should the Commission adopt rules to restrict this practice?

26. *Predictive Dialers.* We seek specific comment on whether a predictive dialer, as a form of automatic telephone dialing system, is subject to the ban on calls to emergency lines, health care facilities, paging services, and any service for which the called party is charged for the call.[95] Specifically, we ask whether a predictive dialer that dials telephone numbers using a computer database of numbers falls under the TCPA's restrictions on the use of autodialers.[96] We seek comment on whether the Commission should adopt rules to further restrict the use of predictive dialers to dial consumers' telephone numbers.[97] In addition to automatically dialing numbers, predictive dialers are set up to "predict" the

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[94] This practice, sometimes referred to as "war dialing," uses automated equipment to dial telephone numbers, generally sequentially, and software to determine whether each number is associated with a fax or voice line. We emphasize that any such autodialed calls to emergency lines, health care facilities, paging services and any service for which the called party is charged for the call would be prohibited under the TCPA. *See* 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

[95] *See* 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64. 1200(a)(1)(i)-(iii).

[96] *See, e.g., Kaplan v. Ludwig and Kustom Karpet Kleaners, Inc.*, County of Wayne, New York (June 6, 2000) (finding that equipment that uses a computer database to dial numbers is not an "automatic telephone dialing system" under the TCPA); *see also* discussion of "automatic telephone dialing system," *supra* paras. 23-24.

[97] Oklahoma Governor Frank Keating signed a bill in June, 2002 (HB-2837) that bans the use of automatic or predictive dialing devices that cause the volume of abandoned calls to exceed 5% of answered calls per day in any telemarketing campaign.

average time it takes for a consumer to answer the phone and when a telemarketer will be free to take the next call. When a consumer answers the telephone, a predictive dialer transfers the call to an available telemarketer. When a predictive dialer simultaneously dials more numbers than the telemarketers can handle, some of the calls are disconnected. The consumer may hear silence on the line as the call is being transferred or a "click" as the call is disconnected.[98] In 1991, the Commission received a total of 757 complaints regarding calls placed to subscribers by autodialers.[99] From June 2000 to December 2001, the Commission received over 1,500 inquiries about predictive dialing alone. In addition, the consumer alert titled "Predictive Dialing: Silence on the Other End of the Line" has received over 16,000 hits on the Commission's website since the alert was posted in February of 2001.[100] In light of the increased use of predictive dialers, the Commission seeks recommendations on what approaches we might take to minimize any harm that results from the use of predictive dialers. Cognizant of the benefits of predictive dialing to the telemarketing industry,[101] the Commission invites comment on whether requiring a maximum setting on the number of

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[98] *See supra* n. 38.

[99] *See In the Matter of the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking*, CC Docket No. 92-90, 7 FCC Rcd 2736 at 2740, para. 24 (1992) (*1992 NPRM*).

[100] Source: The Commission's Consumer & Governmental Affairs Bureau (CGB). *See* http://www.fcc.gov/cgb/consumerfacts/PredictiveAlert.html.

[101] The Direct Marketing Association (DMA) explains that predictive dialers enable small and large companies to reach more customers; allow smaller telemarketers to compete with larger competitors; allow companies to provide a greater number of services at lower prices; and allow telemarketers to better target customers most likely interested in telemarketing offers. *See* DMA's comments filed with the FTC at 43-44.

abandoned calls[102] or requiring telemarketers who use predictive dialers to also transmit caller ID information are feasible options for telemarketers. We also seek comment on whether prohibiting telemarketers from blocking caller ID information would alleviate the harm that results when predictive dialers abandon calls.[103] As noted earlier, under the Commission's caller ID rules, common carriers using SS7 and offering or subscribing to any service based on SS7 functionality are required to transmit the CPN associated with an interstate call to interconnecting carriers.[104] If the Commission were to adopt rules regarding the transmission of caller ID information by telemarketers, should we consider amending the caller ID rules in any way to ensure the two sets of rules are consistent? We also invite commenters to suggest

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[102] The Direct Marketing Association (DMA) recommends that its members voluntarily abide by a 5% abandonment rate on calls.

[103] Consumers would then be able to identify the number of the calling entity and arguably would be better able to hold telemarketers accountable for their practices.

[104] *See* 47 C.F.R. § 64.1601(a). The Commission's caller ID rules also require common carriers to notify subscribers that their telephone numbers may be identified by the calling party. In addition to CPN transmission and subscriber notification requirements, the Commission implemented rules to protect the privacy of the called and calling parties. Specifically, the rules require carriers to recognize *67 as a request for privacy. 47 C.F.R. § 64.1601(b). Dialing *67 before placing a call allows subscribers to block their numbers from transmission to the public switched network. Carriers must also recognize *82 as a request that the CPN be transmitted on an otherwise blocked line. Per call unblocking allows subscribers that have permanently blocked lines to unblock their lines on a per call basis, thus allowing passage of the CPN. The rules also prohibit carriers from revealing the calling party's name or number, and prohibit carriers from allowing the called party to return automatically the call (via Automatic Call Return, or "ACR"), when the original calling party invokes privacy. 47 C.F.R. § 1601(b). Section 64.1601(a) shall not apply when a local exchange carrier with SS7 capability does not have the software to provide *67 or *82 functionalities. Such carriers are prohibited from passing CPN. 47 C.F.R. § 1601(d)(2).

alternative approaches to the problems associated with abandoned calls.

27. *Answering Machine Detection.* Another reason for "dead air" may be the use of Answering Machine Detection (AMD) technology that monitors calls once they are answered.[105] According to DialAmerica Marketing, Inc., AMD can be used along with automatic dialing systems to deliver telemarketing calls. AMD may either send a pre-recorded message to an answering machine or transfer the call to a telemarketer once it detects that a customer has answered the call. According to comments filed with the FTC, if the AMD detects "noise" (*e.g.*, the word "Hello") followed by silence, it assumes that a person has answered the phone. If the AMD detects noise for several seconds, it assumes that it is an answering machine message.[106] In either case, the AMD may be programmed to disconnect the call or send a prerecorded message to an answering machine. In the event that a person has answered the telephone and the call is transferred to a sales representative, the use of AMD involves the monitoring of the line for several seconds and may create "dead air" while the call is being transferred. The Commission seeks comment on the use of AMD by the telemarketing industry and whether AMD technology is responsible for much of the "dead air" consumers encounter. We also seek comment on whether consumers are most frustrated with the delay in response as the call is transferred to a telemarketer, or with calls that are abandoned entirely, or with both. Would restrictions on the use of AMD serve to alleviate the problem of "dead air?" Should restrictions on AMD be implemented in conjunction with restrictions on autodialers and predictive dialers? Commenters are strongly

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[105] *See* DialAmerica Marketing, Inc.'s comments filed with the FTC at 19-20.

[106] *See, e.g.*, DialAmerica Marketing, Inc.'s comments filed with the FTC at 19-22.

encouraged to support their arguments with empirical studies or other specific evidence.

d. Identification Requirements

28. Commission regulations require that a person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.[107] The term "telephone solicitation" is defined to mean the initiation of a telephone call or *message* for the purpose of encouraging the purchase or rental of . . . property, goods, or services . . ." (emphasis added).[108] The TCPA clearly imposes identification requirements upon artificial and prerecorded voice messages[109] and our identification rules apply without limitation to "any telephone solicitation to a residential telephone subscriber."[110] Nonetheless, we seek comment on whether we should modify our rules to state expressly that the identification requirements apply to otherwise lawful artificial or prerecorded messages, as well as to live solicitation calls.

29. Under Commission rules, telemarketers who use autodialers to send artificial or prerecorded messages similarly must identify themselves by name and phone number or address.[111] We seek comment on the Commission's identification requirement at 47 C. F. R. § 64.1200(d) and its applicability to predictive dialing and other circumstances involving abandoned telemarketing calls. We note that, in its discussion on predictive dialing, the FTC maintains that

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[107] 47 C.F.R. § 64.1200(e)(2)(iv).

[108] 47 U.S.C. § 227(a)(3); 47 C.F.R. § 64.1200(f)(3).

[109] 47 U.S.C. § 227(d)(3)(A).

[110] 47 C.F.R. § 64.1200(e)(2)(iv).

[111] 47 C.F.R. § 64.1200(d)(1) and (2).

telemarketers who abandon calls are violating § 310.4(d) of the Telemarketing Sales Rule.[112] The FTC states that, under its rules, when a telemarketer calls a consumer, the telemarketer is required to disclose identifying information to the person receiving the call. According to the FTC, the consumer is "receiving the call" when the consumer answers the telephone.[113] Therefore, if a predictive dialer abandons the call before the telemarketer identifies himself or herself, the FTC proposes that the telemarketer is violating the Telemarketing Sales Rule. We seek comment on whether the Commission should reach a similar conclusion.

e. Artificial or Prerecorded Voice Messages

(i) Commercial and Non-Commercial Calls

30. The TCPA and Commission rules prohibit telephone calls to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is specifically exempted.[114] Commission rules exempt calls that are non-commercial as well as commercial calls that do not include the transmission of any unsolicited advertisement.[115] The rules define "unsolicited advertisement" to mean "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[116] While the Commission has declined to create specific categories of non-commercial exemptions (other than for tax-exempt nonprofit organizations, discussed below), it noted that messages that do not seek to sell a product or

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[112] *See FTC Notice*, 67 Fed. Reg. at 4524; 16 C. F. R. Part 310.

[113] *See FTC Notice*, 67 Fed. Reg. at 4524.

[114] 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2).

[115] *See* 47 U.S.C. § 227(b)(2)(b); 47 C.F.R. § 64.1200(c)(1) and (2).

[116] 47 C.F.R. § 64.1200(f)(5).

service do not tread heavily upon the consumer interests implicated by section 227.[117] Therefore, the Commission determined that calls conducting research, market surveys, political polling, or similar activities which do not involve solicitation as defined by the rules are exempt from the prohibition on prerecorded messages.[118] We note here that the exemption for non-commercial calls applies to a wide range of entities, some of which are engaged in political or religious discourse. This Commission does not intend in this NPRM to seek comment on the exemption as it applies to political and religious speech.[119]

31. We specifically seek comment on artificial or pre-recorded messages containing offers for free goods or services (including free estimates or free analyses) and messages with "information- only" about products. We also invite comment about calls seeking people to help sell or market a business' products (a kind of "help wanted" message).[120] We note that, while these calls do not purport to sell something, they often contain messages advertising the

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[117] *See 1992 NPRM*, 7 FCC Rcd at 2737, para. 11. Among the examples of calls that do not include the transmission of any unsolicited advertisement, the Commission cited calls from a business that wishes to advise its employees of a late opening time due to weather; or calls from a nationwide organization that wishes to remind members of an upcoming meeting or change in schedule; or calls from a catalogue or delivery company to confirm the arrival, shipment, or delivery date of a product to a customer. We note that such calls also would be covered by the exemption for an established business relationship. *See* 47 C.F.R. § 64.1200(c)(3).

[118] *See TCPA Order*, 7 FCC Rcd at 8774, para. 41.

[119] *See TCPA*, Section 2(13), *reprinted in* 7 FCC Rcd 2736 at 2745.

[120] Another example of a "help wanted" call might include a message from an insurance company recruiting agents to help sell insurance policies. *See, e.g., Lutz Appellate Services, Inc. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994) (finding that "help-wanted" fax messages are not unsolicited advertisements under the TCPA).

quality of certain goods or services and are intended to generate future business. Such messages usually include phone numbers that consumers can call to obtain further information, at which time the seller offers additional goods or services for purchase. Such calls arguably have a dual purpose, as in the case when a business calls to inquire about a customer's satisfaction with a product or service already purchased, but is nevertheless motivated in part by the desire to ultimately sell additional goods or services. The Commission therefore seeks comment on whether our rules would better serve consumers and businesses if they more explicitly addressed those calls that include information about a product or service but do not immediately solicit a purchase. Would it balance the interests of consumers and telemarketers more effectively for us to clarify that calls containing offers for free goods or services are prohibited without the prior express consent of the called party? Would such action assist telemarketers in their efforts to comply with our rules, as well as reduce the number of unwanted telephone solicitations? Again, as stated above, we note that we are not seeking comment regarding political or religious speech.[121]

32. Based on public inquiries, we also seek comment on prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity.[122] Does the Commission need to specifically address these kinds of telemarketing calls, and, if so, what rules might we adopt to appropriately balance consumers' interest in restricting unsolicited advertising with commercial freedoms of speech?

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[121] *See supra* para. 30.

[122] *See, e.g.*, Request for Clarification from Robert Biggerstaff, April 12, 2000, CC Docket No. 92-90.

(i) Tax- Exempt Nonprofit Organizations

33. The TCPA excludes calls or messages by tax- exempt nonprofit organizations from the definition of "telephone solicitation."[123] In the *TCPA Order*, the Commission concluded that calls by tax-exempt nonprofit organizations also should be exempt from the prohibition on prerecorded messages to residences as non-commercial calls.[124] Noting that the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities, the Commission found no evidence to show that non-commercial calls represented as serious a concern for telephone subscribers as unsolicited commercial calls.[125] In addition, the Commission determined that calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations.[126] We point out, however, that the Commission has received inquiries over the years about certain practices by nonprofit organizations. We take this opportunity to seek comment on calls made jointly by nonprofit and for-profit organizations and whether they should be exempt from the restrictions on telephone solicitations and prerecorded messages. For example, if a nonprofit organization calls consumers to sell another company's magazines and receives a portion of the proceeds, should such calls fall within the exemption? We emphasize in this NPRM that the exemption for tax- exempt nonprofit organizations applies to religious and political

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[123] 47 U.S.C. § 227(a)(3)(C). The Commission later clarified that telemarketers who solicit on behalf of tax- exempt nonprofit organizations also are not subject to the rules governing telephone solicitations. *See 1995 TCPA Reconsideration Order,* 10 FCC Rcd at 12397, para. 13.

[124] *See TCPA Order*, 7 FCC Rcd at 8773-74, para. 40; *see also* 47 U.S.C. § 227(a)(3)(C) and 47 C.F.R. § 64.1200(c)(4).

[125] *See TCPA Order*, 7 FCC Rcd at 8773-8774, para. 40.

[126] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

organizations that have likewise received tax exempt status from the U. S. government. We note here that the exemption for non- commercial calls applies to a wide range of entities, some of which are engaged in political or religious discourse. In this NPRM, we do not seek comment on the exemption as it applies to political and religious speech.[127] We emphasize that we do not seek comment in this notice on the exemption as it applies to political and religious speech whether conducted by nonprofit organizations or for- profit organizations on behalf of nonprofit organizations. We note that the statute and our rules clearly apply already to messages that are predominantly commercial in nature, and that we will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself by simply inserting purportedly "non- commercial" content into that message.

(ii) Established Business Relationship

34. In the *TCPA Order*, the Commission determined that, based on the record and legislative history, the TCPA permits an "established business relationship" exemption from the restrictions on artificial or prerecorded message calls to residences.[128] The Commission concluded that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.[129] The Commission defined the term "established business relationship" to mean "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding

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[127] *See TCPA*, Section 2(13), *reprinted in* 7 FCC Rcd 2736 at 2745.

[128] *See TCPA Order*, 7 FCC Rcd at 8770, para. 34; 47 C.F.R. § 64.1200(c)(3).

[129] *See TCPA Order*, 7 FCC Rcd at 8770, para. 34.

products or services offered by such person or entity, which relationship has not been previously terminated by either party."[130] We seek comment on whether any circumstances have developed that would justify revisiting these conclusions. If so, would revisiting the exemption interfere with ongoing business relationships or impede communications between businesses and their customers, particularly for small businesses? Should the Commission specify by rule the particular circumstances that would establish the requisite business relationship? We seek comment specifically on whether we should clarify the type of consumer *inquiry* that would create an established business relationship for purposes of the exemption.[131] For example, need we clarify that a consumer's request for information related to business hours or directions to a business location is not an inquiry that would establish the requisite business relationship?[132] The Commission also invites comment on whether merely asking at a previous time about a company's products, services, or

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[130] 47 C.F.R. § 64.1200(f)(4).

[131] The Commission noted in the *TCPA Order* that persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. However, a party making an inquiry cannot be considered to have given prior express consent to future autodialed or prerecorded message calls simply because that party's number has been "captured" by an ANI device or similar system. Nor can a customer inquiry be considered to create a business relationship where the consumer's number has been captured absent that consumer's express invitation or permission to be contacted at the captured number. *See TCPA Order*, 7 FCC Rcd at 8769-71, paras. 31 and 35, n. 67.

[132] The Commission emphasized that, if a caller's number is "captured" by a caller ID or ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. *See TCPA Order*, 7 FCC Rcd at 8769, para. 31.

prices could establish a prior business relationship.[133] If so, is there any time limitation to such relationships?

35. We also seek comment on the interplay between the established business relationship exemption and a customer's request not to receive calls from a person or entity with which the customer has a prior business relationship.[134] In the TCPA Order, the Commission noted that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list.[135] The Commission explained that a customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation.[136] We seek comment on

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[133] We note the following legislative history on this issue: "In the Committee's view, an 'established business relationship' also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. However, the Committee strongly believes that a subsequent telemarketing solicitation by an entity with an 'established business relationship' to an objecting consumer must be substantially related to the product or service which formed the basis of the prior relationship. By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services." H.R.Rep. No. 102-317, at 14, 102nd Cong. 1st Sess. (1991).

[134] *See, e.g.*, Request for Clarification from Robert Biggerstaff, May 1, 2000, CC Docket No. 92-90; *see also* discussion about the effect of the established business relationship exemption on the telecommunications industry, *supra* para. 20.

[135] *See TCPA Order*, 7 FCC Rcd at 8770, n. 63.

[136] *See TCPA Order*, 7 FCC Rcd at 8770, n. 63; *see also* H. R. Rep. No. 102- 317, at 15-16, 102 nd Cong. 1 st Sess. (1991) (" If a subscriber asks a company with whom it has an established relationship not to call again, the company has an obligation to honor the request and avoid further contacts. Despite the fact that objecting subscribers can be called based on an 'established business relationship, ' it is the strongly held view of the

the effect of a do-not-call request on a prior business relationship. Specifically, should a company be obligated to honor a do-not-call request even when the customer continues to do business with the entity making the solicitations?[137] Or is the consumer obligated to first terminate all business with the company before the company must suspend solicitation calls to that customer? For example, must a consumer who subscribes to a daily newspaper or holds a credit card cancel the newspaper subscription or credit card in order to stop future solicitation calls from those businesses?[138]

f. Time of Day Restrictions

36. In the *TCPA Order*, the Commission concluded that it was in the public interest to impose time of day restrictions on telephone solicitations as reasonable limitations on telemarketing to residences.[139] Accordingly, the Commission implemented regulations that prohibited unsolicited sales calls before 8: 00 am and after 9: 00 pm local time at the called party's location.[140] As part of our review of the current

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Committee that once a subscriber objects to a business that calls based on an established relationship, such business must honor this second objection and implement procedures not to call that twice- objecting subscriber again").

[137] Two examples of an "ongoing relationship" might include: (1) a consumer who subscribes to a newspaper and requests that the newspaper not call again about other services; or (2) a consumer who holds a credit card with a company and has asked not to receive future telephone solicitations. Should a call by a newspaper or magazine to renew a subscription be permitted because of an existing business relationship, even after the customer has requested that the company not call again?

[138] *See, e.g., Charvat v. Dispatch Consumer Services, Inc., et al.*, 769 N.E.2d 829 (Ohio 2002) (finding that an existing customer can effectively terminate an "established business relationship" for purposes of the TCPA, by requesting to be placed on a do-not-call list).

[139] *See TCPA Order*, 7 FCC Rcd at 8767-68, paras. 25-26.

[140] 47 C.F.R. § 64.1200(c)(1). The Commission later clarified that calls made before 8 am or after 9 pm do not violate the TCPA rules if they are

TCPA rules, we seek comment on how effective these time restrictions have been at limiting objectionable solicitation calls. The FTC's Telemarketing Sales Rule also includes calling time restrictions that are consistent with the FCC's rules on calling hours.[141] The FTC indicates that the current calling time restrictions provide reasonable protections for consumers' privacy while not burdening the telemarketing industry.[142] The FTC also notes that altering the calling hours under the TSR would create a conflict in the federal [FCC] regulations governing telemarketers.[143] We seek comment on this reasoning. In addition, should more restrictive calling times be adopted only in the event a national do-not-call list is not established, or could they work in conjunction with a national registry to better protect consumers from receiving telephone solicitations to which they object?

g. Unsolicited Facsimile Advertisements

37. The TCPA prohibits the transmission of unsolicited advertisements by telephone facsimile machines[144] and

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made with the prior express invitation or permission of the resident. If a resident withdraws express consent, however, any further solicitations to that resident by or on behalf of the same person or entity will be subject to the Commission's rules on telephone solicitations barring calls before 8 am or after 9 pm. *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12396, paras. 10-11.

[141] 16 C.F.R. § 310.4(c).

[142] *FTC Notice*, 67 Fed. Reg. at 4521.

[143] *FTC Notice*, 67 Fed. Reg. at 4521.

[144] 47 U. S. C. § 227(b)(1)(C). The TCPA's provision on unsolicited faxes has been held unconstitutional by one United States district court on grounds that it violates the First Amendment's guarantee of freedom of speech. *See State of Missouri, ex rel. Nixon v. American Blast Fax, Inc., et al.*, 196 F.Supp.2d 920 (E.D. Mo. Mar. 13, 2002); appeal pending Nos. 02- 2705 & 02- 2707 (8th Circuit). *But see, Texas v. American Blast Fax*, 121 F. Supp. 2d 1085, 1091-92 (W.D. Tex. 2000), *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1167- 69 (S.D. Ind. 1997), *Destination Ventures, Ltd. v. FCC*, 46 F. 3d 54 (9th Cir. 1995) (holding that the

requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[145] We seek comment on the continued effectiveness of these regulations and on any developing technologies, such as computerized fax servers, that might warrant revisiting the rules on unsolicited faxes. In considering any possible rule changes, we will take into account both the record developed during this proceeding, as well as the Commission's extensive enforcement experience regarding the rules on unsolicited fax advertisements.

(i) Prior Express Invitation or Permission

38. The TCPA prohibits the sending of unsolicited advertisements to telephone facsimile machines.[146] The Commission's rules define an unsolicited advertisement as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[147] We seek comment on the need to clarify what constitutes prior express invitation or permission for purposes of sending an unsolicited fax. In the *1995 TCPA Reconsideration Order*, the Commission determined that the intent of the TCPA was not to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertise-

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TCPA's ban on unsolicited faxes did not violate the First Amendment), *aff'g* 844 F. Supp. 632, 634-40 (D.Or. 1994), *Minnesota v. Sunbelt Communications and Marketing*, Civil No. 02-CV-770 (JEL/JGL) (D. Minn. Sept. 4, 2002).

[145] 47 U.S.C. § 227(d)(1). The Commission determined that the sender of a facsimile message is the creator of the content of the message. *See 1997 Reconsideration Order*, 12 FCC Rcd at 4613, para. 6.

[146] 47 U.S.C. § 227(b)(1)(C).

[147] 47 C.F.R. § 64.1200(f)(5).

ments.[148] The Commission determined that given the variety of ways in which fax numbers may be distributed, it was appropriate to treat the issue of consent in any complaint on a case-by-case basis.[149] We seek comment on the circumstances in which facsimile numbers are distributed or published by individuals and businesses. We invite comment specifically on the issue of membership in a trade association or similar group. For example, should the publication of one's fax number in an organization's directory constitute an invitation or permission to receive an unsolicited fax?[150] The Commission also seeks comment on what effect its case-by-case analysis has had on the number of unsolicited faxes sent to consumers and on costs incurred by the recipients of such faxes.

(ii) Established Business Relationship

39. We seek comment on the Commission's determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions.[151] This determination has amounted to an effective exemption from the prohibition

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[148] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12408, para. 37.

[149] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12408-9, para. 37. The Commission noted that facsimile numbers may be distributed using business cards, advertisements, directory listings, trade journals, or by membership in an association.

[150] *See, e.g.*, A Petition for a Declaratory Ruling, filed by John Holcomb, October 3, 2001, CC Docket No. 92-90; *see also Holcomb v. SullivanHayes Brokerage Corporation*, Case No. 01CV2193, District Court–El Paso County, Colorado (Feb. 25, 2002) (finding that disclosure of a fax number as part of membership in a business or professional organization does not constitute consent to receive faxed ads from other members of the organization).

[151] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd 12408, para. 37.

on sending unsolicited facsimile advertisements, although our rules do not expressly provide for such an exemption. We ask whether, in practice, the Commission's previous determination has served to protect ongoing business relationships and whether it has had any adverse impact on consumer privacy. If we were to preserve the "exemption," should we amend our rules to expressly provide for it? We also seek comment on the need to clarify the scope of the "exemption." For instance, should a company that has an established relationship with a customer based on one type of product or service also be allowed to send unsolicited faxes about a different service or product? We invite comment on a consumer's authority to stop faxes to his facsimile number from a business with which he has an established relationship. Is it necessary for the Commission to adopt rules to protect consumers from unsolicited faxes in such circumstances?

(iii) Fax Broadcasters

40. We seek comment on whether the Commission should address specifically in the rules the activities of "fax broadcasters" who transmit other entities' advertisements to a large number of telephone facsimile machines for a fee. In the *TCPA Order*, the Commission stated that "[i]n the absence of a 'high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,' *common carriers* will not be held liable for the transmission of a prohibited facsimile message."[152] When asked whether common carriers' exemption from liability extended to entities that engage in fax broadcasting but are not common carriers, the Commission found that "[t]he entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not

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[152] *TCPA Order*, 7 FCC Rcd at 8780, para. 54 (emphasis added) (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987)).

liable for compliance with the rule."[153] In a later order further addressing fax broadcasters' obligations under the TCPA rules, the Commission stated that "[f]acsimile broadcast service providers are businesses or individuals that transmit messages on behalf of other entities to selected destinations and that do not determine either the message content or to whom they are sent."[154] Some fax broadcasters maintain lists of telephone facsimile numbers that they use to direct their clients' advertisements.[155] This practice, among others, indicates a fax broadcaster's close involvement in sending unlawful fax advertisements and may subject such entities to enforcement action under the TCPA and our existing rules.[156] Based on the number of complaints and inquiries the Commission has received in the last few years on unwanted faxes,[157] and the apparent prevalence of fax broadcasters that determine the destination of their clients' advertisements, we seek comment on whether the Commission should address specifically in the rules the activities of such fax broadcasters. Should the Commission amend the rules to state explicitly that certain fax broadcasting practices expose the fax broadcaster to liability under the TCPA and the Commission's

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[153] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12407, para. 35.

[154] *1997 TCPA Reconsideration Order*, 12 FCC Rcd at 4610 n. 7.

[155] *See, e.g.*, website maintained by Fax. com, Inc.:

> Fax. com is the only enhanced fax company offering the world's largest database of fax numbers cataloged by location. Broadcast your advertising fax based on Radius, Zip Codes, Metro Area, Area Code, County, State or the entire United States. When you choose to use Fax. com's proprietary database, you can receive a precise breakdown of how many people you'll be faxing and in what region. There's no other fax database like it! http://www.fax.com/Services/faxblast.asp (website visited June 28, 2002).

[156] *See, e.g., Fax. com NAL*, FCC 02-226 (rel. Aug. 7, 2002).

[157] *See supra* n. 40 and para. 8.

rules? Should the Commission specify by rule the particular activities that would demonstrate a fax broadcaster's "high degree of involvement" in the unlawful activity of sending unsolicited advertisements to telephone facsimile machines? Would such a rule afford consumers a greater measure of protection from unlawful faxing than they already enjoy under existing rules? Would such a rule better inform the business community about the general prohibition on unsolicited fax advertising? Have the Commission's rules that require fax advertisements to identify the entity on whose behalf the messages are sent been effective at protecting consumers' rights to enforce the TCPA?

h. Wireless Telephone Numbers

41. The TCPA and the Commission's rules specifically prohibit telephone calls using an autodialer or an artificial or prerecorded voice message to any telephone number assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party.[158] The Commission's rules also state that live telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists. The Commission has not opined on whether wireless subscribers or a subset thereof are "residential telephone subscribers" for purposes of these restrictions.[159]

42. Since 1991, the commercial wireless industry has grown dramatically, both in the number of subscribers and the amount of usage for each subscriber.[160] A USA Today/

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[158] 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F R. § 64. 1200(a)(1)(iii).

[159] 47 C.F.R. § 64.1200(e).

[160] From December 1991 to December 2001, the estimated number of wireless subscribers increased from approximately 7.5 million to approximately 128 million. From 1993 to 2001, the average minutes of use per

CNN/Gallop poll found that almost one in five mobile telephony users regard their wireless phone as their primary phone.[161] Also, many wireless consumers purchase large "buckets" of minutes at a fixed rate, which may have an impact on the way consumers perceive the costs of making and receiving calls on their wireless phones.[162]

43. We seek comment on the extent to which telemarketing to wireless consumers exists today. Specifically, we seek comment on whether consumers receive solicitations on their wireless phones, and the nature and frequency of such solicitations. We also seek comment on whether telemarketers are including or targeting wireless phone numbers in their telemarketing calls. Do telemarketers distinguish between wireless and wireline phone numbers and, if so, how?

44. In addition, we seek comment on whether the Commission's TCPA rules are sufficient to address any issues identified above, or whether any revisions are necessary. For example, should wireless telephone numbers or a subset thereof be considered "residential telephone numbers" for the purposes of the Commission's rules on telephone solicitations?[163] If so, should there be any different rules that apply to solicitations to wireless telephone numbers than already would apply under section 64.1200(e)?

45. We note that the TCPA permits the Commission to exempt from the restrictions on autodialer or prerecorded

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subscriber per month increased from 140 minutes to 385 minutes. *See 2002 CMRS Competition Report* at C-2, C-12.

[161] *2002 CMRS Competition Report*, Section II.A.1.e, citing Michelle Kessler, *18% See Cellphones as Their Main Phone*, USA Today, Feb. 1, 2002.

[162] *2002 CMRS Competition Report*, Section II.A.1.d.i.

[163] *See* 47 C.F.R. § 64.1200(e), which places restrictions on any telephone solicitation to a residential telephone subscriber.

message calls to wireless phone numbers "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect."[164] In the *TCPA Order*, the Commission concluded that calls made by cellular carriers to their subscribers for which the subscribers were not charged do not fall within the prohibitions on autodialers or prerecorded messages.[165] We seek comment on whether there are other types of calls to wireless telephone numbers that are not charged to the called party, and whether such calls also should not fall within the prohibitions on autodialers or prerecorded messages.

46. Lastly, we seek comment on any developments anticipated in the near future that may affect telemarketing to wireless phone numbers. For example, when consumers are able to port numbers from their wireline phones to wireless phones, or are assigned numbers from a pool of numbers rather than from a full central office code, how will telemarketers identify wireless numbers in order to comply with the TCPA?[166] We therefore seek comment on the

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[164] 47 U.S.C. § 227(b)(2)(C).

[165] *TCPA Order*, 7 FCC Rcd at 8775, para. 45.

[166] The Commission had determined that, by November 24, 2002, wireless carriers in the largest 100 Metropolitan Statistical Areas (MSAs) were required to support service provider local number portability (LNP), in the areas in which another carrier has made a specific request for the provision of LNP. LNP will enable wireless customers to "port" their telephone numbers in the event they switch from one wireless carrier to another, or from a wireline to a wireless carrier. On July 16, 2002, the Commission adopted an order extending the LNP deadline for a period of one year until November 24, 2003. *See In the Matter of Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, WT Docket No. 01-184 and CC Docket No. 95-116, Memorandum Opinion and Order, FCC 02-215 (rel. July 26, 2002).

availability of any technological tools that would allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or to recognize wireless numbers that have been assigned from a pool of numbers that formerly were all wireline. For example, we note that the public safety community is finalizing plans that would enable Public Safety Answering Points to identify the type of phone from which the caller is making an emergency call. The Number Portability Administration Center administrator, Neustar, has, however, limited access to this Interactive Voice Response (IVR) system to service providers, authorized law enforcement, and public safety agencies.[167] Telemarketers currently do not have access to the IVR system. Should telemarketers be given access to the IVR system, or should access to the IVR system continue to be restricted to service providers, law enforcement, and public safety agencies? If telemarketers are granted access, will the IVR system be sufficient to enable them to determine whether a number serves a wireline or wireless subscriber? If telemarketers should not be given access to the IVR system, or if this system will be insufficient to identify whether a number serves a wireless or wireline subscriber, should a different system be developed, perhaps based on the IVR system,[168] for use by telemarketers?

i. Enforcement

(i) Private Right of Action and Individual Complaints

47. Based on the statutory language, the Commission determined that "[a]bsent state law to the contrary, consumers

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[167] The Interactive Voice Response (IVR) system allows its users to determine whether a particular telephone number is serving a wireline or wireless subscriber by identifying the carrier serving the subscriber.

[168] Perhaps telemarketers could have limited access to a modified IVR system that would provide a wireless service code, rather than carrier-specific information, for a particular number.

may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic dialing system and artificial or prerecorded voice messages."[169] The Commission also determined that the TCPA permits a consumer to file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations.[170] The Commission has continued to receive inquiries about a consumer's right to file suit against a person or entity that has made one phone call in violation of the TCPA rules. Should we clarify whether a consumer may file suit after receiving one call from a telemarketer who, for example, fails to properly identify himself or makes a call outside the time of day restrictions? In addition, telemarketers that are not common carriers are not currently subject to the informal complaint rules that require common carriers to reply to individual complaints upon notice of a complaint by the Commission. The Commission released an NPRM in February seeking comment on whether to extend the informal complaint rules to entities other than common carriers.[171] We seek comment in this proceeding on whether the Commission should amend these informal complaint rules to apply to telemarketers

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[169] *TCPA Order*, 7 FCC Rcd at 8780, para. 55; *see also* 47 U.S.C. § 227(b)(3).

[170] 47 U.S.C. § 227(c)(5); *see also TCPA Order*, 7 FCC Rcd at 8780, para. 55.

[171] 47 C.F.R. § 1.716 et seq. See also Establishment of Rules Governing Procedures to Be *Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission; Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures to Be Followed When Informal Complaints Are Filed Against Common Carriers; 2000 Biennial Review*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CI Docket No. 02- 32, CC Docket Nos. 94-93, 00-175, 17 FCC Rcd 3919 (2002).

(ii) State Law Preemption

48. In the TCPA, Congress provided a standard for preemption of state law on autodialers, artificial or prerecorded voice messages, and telephone solicitations.[172] The TCPA does not preempt "any state law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."[173] The Commission seeks comment on whether and, if so, to what degree, state requirements should be preempted. Some courts have held that the TCPA does not necessarily preempt less restrictive state laws on telemarketing.[174] We seek comment on this interpretation. In addition, we ask whether preemption should depend on whether the state law in question applies solely to intrastate telemarketing or to interstate telemarketing as well. What conflicts between state telemarketing laws and federal law might warrant preemption?

2. National Do-Not-Call List

49. Pursuant to section 227(c)(3) of the TCPA, the Commission "may require the establishment and operation of a

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[172] *See* 47 U.S.C. § 227(e).

[173] 47 U.S.C. § 227(e)(1). The TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages. *See* 47 U.S.C. § 227(e) and *TCPA Order*, 7 FCC Rcd at 8780-81, para. 56.

[174] *See, e.g., Van Bergen v. Minnesota*, 59 F. 3d 1541 (8th Cir. 1995) (concluding that the "savings clause" of section 227(e)(1) does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted); *see also Kaufman v. ACS Systems, Inc.*, No. BC222588 (Los Angeles Superior Ct. Dec. 12, 2001).

single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."[175] In this section, we seek comment on whether the Commission should revisit its determination not to adopt a national do-not-call list.[176] Persistent consumer complaints regarding unwanted telephone solicitations indicate that the time may now be ripe to revisit this issue.[177] We note that a national list might provide consumers with a one-step method for preventing telemarketing calls. This option might be less burdensome than repeating requests on a case- by- case basis, particularly in light of the number of entities that conduct telemarketing today. A national list might also be less burdensome for telemarketers, who, under the company- specific approach, must retain do-not-call records for a period of ten years.[178] We also seek comment on the options for possible Commission action in conjunction with the FTC's proposal to adopt a nationwide do-not-call list for those entities over

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[175] 47 U.S.C § 227(c)(3).

[176] As noted in paragraph 11 above, we ask commenters to address issues relating to a national do-not-call list separately from issues relating to our existing TCPA rules.

[177] The FTC received over 40,000 comments in response to its Notice. According to this Commission's most recent Quarterly Workload Report, in the wireline category, the top area of complaint after billing and rates was compliance with the TCPA. The Commission received 1,385 such complaints in the third quarter of FY 2002 (April–June, 2002). In addition, the Commission received 6,994 TCPA-related inquiries in the third quarter of FY 2002. See Consumer & Governmental Affairs Bureau Quarterly Report, 3 rd Quarter, FY 2002 (rel. July 30, 2002). The Commission has taken numerous enforcement actions in response to such complaints. *See, e.g., 21st Century Fax(es) Ltd. a.k.a. 20th Century Fax(es), Apparent Liability for Forfeiture*, Forfeiture Order, File No. EB-00-TC-174, FCC 02-2 (rel. Jan. 11, 2002).

[178] *See* 47 C. F. R § 64.1200(e)(2)(vi).

which it has jurisdiction and the proliferation of state-adopted do-not-call lists. We acknowledge that the FTC has not yet adopted final rules based on its proposal, and we note that we have the option to seek further comment to fully address the interplay between final FTC rules and possible Commission action.

50. As discussed above, we invite comment in the context of our consideration of a national do-not-call list on the constitutional standards applicable to governmental regulation of commercial speech.[179] Specifically, we seek comment on whether a national do-not-call list satisfies each of the standards articulated in *Central Hudson*, including the requirement that the regulation be narrowly tailored to ensure that it is no more extensive than necessary to serve the governmental interest.[180]

51. In declining to adopt a national do-not-call list in 1992, the Commission concluded that a national database would be costly and difficult to establish and maintain in a reasonably accurate form.[181] The Commission found that frequent updates would be required, regional telemarketers would be forced to purchase a national database, costs might be passed on to consumers, and the information compiled would present problems in protecting consumer privacy. The Commission noted that, because nearly one-fifth of all telephone numbers change each year, any such database would require frequent updates to remain accurate.[182] The Commission also noted concerns in protecting the privacy of telephone subscriber information including whether the confidentiality of sub-

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[179] *See supra* para. 12.

[180] *Central Hudson*, 447 U. S. at 565-66.

[181] *TCPA Order*, 7 FCC Rcd at 8760, para. 14. Commenters then estimated that the start- up and operational costs for a national database in the first year ranged from $20 million to $80 million. *Id.* at 8758, para. 11.

[182] *TCPA Order*, 7 FCC Rcd at 8759, para. 12.

scribers having unpublished or unlisted numbers could be maintained.

52. We seek comment on any disadvantages to consumers or any other parties to establishing a national do-not-call list including whether the concerns noted by the Commission in declining to adopt a national do-not-call list in 1992 remain persuasive today.[183] Specifically, we seek information regarding the potential costs of establishing and maintaining a national do-not-call database, the burdens on telemarketers of compliance with a national do-not-call database, and whether there should be any distinction on a national, regional, state, or local level or for small businesses.[184] In particular, we seek comment on whether technological innovations in computers and software programs over the last ten years have mitigated, in any respect, concerns about the costs, accuracy, and privacy issues involved in establishing a national database.[185] We also seek comment on how state commissions and parties involved in compiling and maintaining the state established do-not-call lists have dealt with each of these issues. The information and experience acquired by these parties in the actual operation of such databases may prove particularly useful in this analysis. We also seek comment on what effect, if any, some combination of efforts by the FTC, states, and this Commission would have on the cost and privacy issues involved in developing and maintaining a national do-not-call

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[183] For example, the FTC estimates that the cost to develop and implement a national registry will be approximately $5 million in the first year. *See FTC User Fee Notice*, 67 Fed. Reg. 37362 at 37363 (2002).

[184] *See* 47 U.S.C. § 227(c)(4).

[185] The FTC has issued a Privacy Act Notice noting its intent to compile and maintain the data collected in response to the national do-not- call list "in a secure electronic database designed, developed, operated, and serviced by agency and/ or contractor personnel bound by the restrictions of the Privacy Act." *See* FTC Privacy Notice, 67 Fed. Reg. 8985 (2002).

list. We seek comment on whether a national do-not-call list provides any advantages to telemarketers in identifying those consumers who do not wish to be contacted.

53. Section 227(c)(3) enumerates a number of specific requirements that the Commission must satisfy in adopting a national database.[186] In relevant part, these include: (1) specifying a method by which to select an entity to administer the database; (2) requiring each common carrier providing telephone exchange service to inform subscribers of the opportunity to object to receiving telephone solicitations; (3) specifying the methods by which subscribers may be informed, by the common carrier that provides service to the subscriber, of the subscriber's right to give or revoke a notification of an objection to receiving telephone solicitations; (4) specifying the methods by which such objections shall be collected and added to the database; (5) prohibiting any residential subscriber from being charged for giving or revoking such notification or being included in the database; (6) prohibiting any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in the database; (7) specifying the method by which any person desiring to make or transmit telephone solicitations will obtain access to the database and the costs to be recovered from such persons; (8) specifying the methods for recovering, from persons accessing the database, the cost involved in operating the database; (9) specifying the frequency with which the database will be updated and the method by which such updates will take effect; (10) designing the database to enable states to use it to administer or enforce state law; (11) prohibiting the use of the database for any purpose other than compliance with the requirements of section 227 and any such state law, and specifying methods for protection of the privacy rights of persons whose

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[186] 47 U.S.C. § 227(c)(3)(A-L).

numbers are included in the database; and (12) requiring each common carrier providing services to any person for the purpose of making telephone solicitations to notify such persons of the requirements of this section and the regulations thereunder. We seek comment on what possible options the Commission might pursue that would satisfy the requirements listed above, as well as complement the FTC's proposal and the individual state do-not-call statutes and regulations. We note that while the FTC's proposal could incorporate some, if not all, of the twelve criteria above, the FTC is not required by statute to satisfy these requirements. Therefore, we ask whether these twelve requirements would preclude the Commission from adopting rules requiring common carriers and other entities under our TCPA jurisdiction to comply with a national do- not- call regime administered by the FTC, should the FTC adopt rules that are inconsistent with the TCPA.

54. We recognize that the effectiveness and value of any national do-not-call list would be contingent upon an informed public. As noted above, Congress provided that, should the Commission establish a national do-not-call list, each common carrier providing telephone exchange service shall be required to inform its subscribers of the opportunity to object to telephone solicitations and the option to register with a national do-not-call list.[187] As part of our ongoing efforts to ensure that consumers are aware of their rights under the TCPA, we will continue to disseminate our own public notices, fact sheets, and other information to publicize the rules applicable to telemarketing calls. In addition, should we establish a national do-not-call list, we propose adopting rules that codify the statutory provisions requiring common carriers to notify their subscribers of the opportunity to place their telephone numbers on a national do-not-call list. We

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[187] *See* 47 U.S.C. §§ 227(c)(3)(B) and (C).

seek input on this proposal and any other suggestions to ensure that consumers are well informed.

55. *FTC Proposal to Adopt a Nationwide Do-Not-Call List.* As noted above, the FTC has recently issued a Notice of Proposed Rulemaking seeking comment on a number of potential amendments to its Telemarketing Sales Rule.[188] In relevant part, the FTC proposes to adopt a national do-not-call list that would allow consumers to prohibit calls from any telemarketer within the FTC's jurisdiction by placing their telephone number on a central registry to be maintained by, or on behalf of, the FTC.[189] Because the FTC lacks jurisdiction over banks, common carriers, insurance companies, and certain other entities, these entities could continue to make telemarketing calls to individuals on the FTC's do-not-call list.[190] We seek comment on whether the Commission should use its authority under the TCPA to extend any national do-not-call requirements adopted by the FTC to those entities that fall outside the FTC's jurisdiction. If so, we seek comment on what role the Commission should play in the administration and enforcement of a national database.

56. If the Commission should determine that a national do-not-call list is warranted, we seek comment on what actions

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[188] 16 C.F.R. Part 310. These proposals include additional disclosure requirements, prohibitions on certain billing practices, and prohibitions on the blocking of caller ID.

[189] The FTC proposes that consumers who have placed themselves on the national do-not-call registry could allow telemarketing calls from or on behalf of specific sellers, or charitable organizations, by providing "express verifiable authorization" to the seller, or telemarketer making calls for or on behalf of the organization, that the consumer agrees to accept calls from that telemarketer. *FTC Notice*, 67 Fed. Reg. at 4517.

[190] *See* 15 U.S.C. § 45(a)(2). The FTC has stated that, although it does not have jurisdiction over these entities, it does have jurisdiction over any third-party telemarketers those entities might use to conduct telemarketing activities on their behalf. *FTC Notice*, 67 Fed. Reg. at 4497.

the Commission could take to most efficiently, effectively, and consistently complement the FTC's proposal. The FTC indicates that its do-not-call proposal is consistent with the Commission's regulations and should "not be construed to permit any conduct that is precluded or limited by FCC regulations."[191] If inconsistencies exist at the end of the rulemakings, would this create confusion regarding the applicability and enforcement of the do-not-call requirements to certain entities? For example, the FTC proposes to extend the do-not-call requirement to telemarketing calls from "for-profit entities" that solicit charitable contributions.[192] In so doing, the FTC indicates that its authority extends not only to the sale of goods or services but also to charitable solicitations by for-profit entities on behalf of nonprofit organizations. The Commission has concluded, however, that its regulations under the TCPA apply only to commercial calls.[193] In addition, the TCPA specifically excludes "tax exempt nonprofit organizations" from its provisions.[194] The Commission has concluded that this exemption for nonprofit organizations extends to telephone solicitations made by telemarketers on behalf of tax- exempt nonprofit organizations.[195] We seek comment on whether this interpretation raises possible inconsistencies with the FTC's proposal. If so, we seek comment on how these inconsistencies could be reconciled in the administration of any national do- not-call database.

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[191] *FTC Notice*, 67 Fed. Reg. at 4519.

[192] *FTC Notice*, 67 Fed. Reg. at 4497.

[193] *See* TCPA Order, 7 FCC Rcd at 8773-74, para. 40.

[194] 47 U.S.C. § 227(a); *see also* discussion in para. 33 on calls by religious and political organizations that have received tax- exempt status from the U. S. government. This Commission does not intend in this NPRM to seek comment on the exemption as it applies to political and religious speech.

[195] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

57. The FTC's proposal also may allow some business and wireless telephone subscribers to register on the national database.[196] The TCPA, however, only grants authority to the Commission to establish a national database for residential subscribers.[197] We seek comment on the extent to which wireless subscribers may be considered "residential" for purposes of the TCPA.[198] In addition, we seek comment on what, if any, conflict exists under the FTC's rules and proposals and the TCPA regarding inclusion of business consumers on the national do-not-call list. The FTC proposal also does not indicate whether consumers will be charged a fee for including their names on the national do-not-call database.[199] We note that the TCPA prohibits the Commission from charging residential consumers to be included in the database.[200] We seek comment on whether these and any other issues that commenters may identify raise potential

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[196] Section 310.6(g) of the FTC's Telemarketing Sales Rule exempts most business-to business telemarketing from the Rule's requirements; only the sale of nondurable office and cleaning supplies are covered under the Rule. The FTC, however, proposes to also eliminate this exemption for telemarketers of Internet and Web services. *FTC Notice*, 67 Fed. Reg. at 4531-32.

[197] *See* 47 U.S.C. § 227(c)(3).

[198] Section 227(b)(1) prohibits calls using any automatic telephone dialing system or an artificial or prerecorded voice to any service for which the called party is charged for the call. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

[199] The FTC has indicated on its website that consumers will be able to call a toll free number and enter their request to be included on the national do-not-call database. The FTC has indicated that it proposes to collect $3 million in user fees from approximately 3,000 telemarketers or sellers that may be required to use the national registry. FTC User Fee Notice, 67 Fed. Reg. at 37363. Under the FTC's proposal, telemarketers would be charged $12 per year for each area code of data they use with a maximum annual cap of $3, 000.

[200] *See* 47 U.S.C. § 227(c)(3)(E).

areas of concern in coordinating the FTC's proposals with any Commission action. To the extent that any such inconsistencies exist, we seek suggestions as to how they could be reconciled to minimize the potential for confusion to consumers, telemarketers, and regulators in the administration and enforcement of any national do-not-call database established under the combined authority of the FTC and the Commission.

58. We also seek comment on whether the Commission should adopt any new rules or revise any of its existing rules to remain consistent with the proposals of the FTC. For example, the FTC proposes that consumers who have placed themselves on the national do-not-call registry "could allow telemarketing calls from or on behalf of specific sellers, or on behalf of charitable organizations, by providing express verifiable authorization to the seller, or telemarketer making calls on behalf of a seller or charitable organization, that the consumer agrees to accept calls from that seller or telemarketer."[201] The FTC also proposes adopting certain recordkeeping requirements that must be met before companies may avail themselves of the "safe harbor" protections for violating the do-not-call rules.[202] In so doing, the FTC

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[201] *FTC Notice*, 67 Fed. Reg. at 4517. The FTC proposes two means of obtaining the express verifiable authorization of a consumer to receive telemarketing calls despite that consumer's inclusion on the national do-not-call list: (1) written authorization including the consumer's signature; and (2) oral authorization that is recorded and authenticated by the telemarketer as being made from the telephone number to which the consumer is authorizing access.

[202] *FTC Notice*, 67 Fed. Reg. at 4520. These include the requirement that: (1) sellers and telemarketers must obtain and reconcile on not less than a monthly basis the names and/ or telephone numbers of those on the national registry; (2) sellers and telemarketers must maintain the consumers' express verifiable authorization to call; and (3) sellers and telemarketers must monitor compliance and take disciplinary action for non-compliance.

notes that the Commission's rules are silent as to any such requirements to reconcile names or numbers on a national registry because our rules relate only to company- specific lists. We seek comment on whether, if the Commission implements a national database with the FTC, the Commission should adopt recordkeeping or other rules that mirror those proposed by the FTC.

59. Finally, we note that the FTC has sought comment on establishing a national do-not-call registry for a two-year trial period, after which it may review the costs and benefits of the central registry in order to determine whether to modify or terminate its operation.[203] We seek comment on how this could affect any Commission decision to establish a joint database with the FTC, including whether the Commission should commit to a similar review at the same time. We also seek comment on what, if any, disruptions this may cause consumers if the FTC determines at that time to terminate the operation of its national do-not-call database. Finally, we note that the FTC has released a Privacy Act Notice specifying the measures it intends to take to ensure the privacy of consumers in compiling and maintaining the national registry.[204] In its Notice, the FTC proposes to collect certain information including, at a minimum, telephone numbers of individuals who do not wish to receive telemarketing calls.[205] To the extent necessary, the FTC may collect other information such as date(s) and time(s) that the individual's telephone number was placed on the registry; the individual's specific telemarketing preferences; and other identifying information that individuals may provide voluntarily (e. g., residential zip codes for record sorting purposes). The FTC expects to use automated methods to collect the information and to process

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[203] *FTC Notice*, 67 Fed. Reg. at 4517.

[204] FTC Privacy Act Notice, 67 Fed. Reg. at 8985.

[205] *See* FTC Privacy Act Notice, 67 Fed. Reg. at 8986.

requests from individuals seeking access to their records in the system. The FTC states that it intends to maintain these records in a secure electronic database operated by that agency and/ or contractor personnel bound by the restrictions of the Privacy Act.[206] We seek comment on whether the Commission should impose any requirements beyond those proposed by the FTC to ensure that consumer proprietary information would be protected in a national database.

60. *State Do-Not-Call Lists*. As noted above, a number of states have adopted or are considering legislation to establish statewide do-not-call lists.[207] Such state lists vary widely in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions. Some state statutes provide for state- managed do-not-call lists, while others require telemarketers to use the Direct Marketing Association's Telephone Preference Service.[208] In some states, residents can register for the do-not-call lists at no charge.[209] In others, telephone subscribers must pay a fee. The state "do-not-call" statutes provide for varying exceptions to the do-not-call requirements. In the context of our review of the national do-not-call database, we seek comment on how effective these state administered do-not-call lists have been in curbing unwanted telephone solicitations and whether a national database would correct any of the shortcomings of the state lists.

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[206] *See* FTC Privacy Act Notice, 67 Fed. Reg. at 8986.

[207] *See supra* n. 48.

[208] *See e.g.*, Wyoming (Wyo. Stat. Ann. § 40-12-301) and Maine (Me. Rev. Stat. § 4690-A).

[209] *See* Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24. 4.7); Missouri (Mo. Rev. Stat. § 407.1098); Tennessee (Tenn. Code Ann. § 65-4-401; *see also* rules at Tenn. Comp. R & Regs. Chap. 1220-4-11).

61. If the Commission should establish a nationwide do-not-call list in conjunction with the FTC, we seek comment on the potential relationship of that database to state do-not-call laws. We seek comment on the potential role that states could play in administering and enforcing federal do-not-call requirements. We believe that many states have obtained valuable experience and insight into the administration of the do-not-call lists in their respective states. We therefore seek comment from the states, and any other interested parties, on the following options to incorporate state expertise in this process. We also invite additional suggestions on these or any alternative proposals.

62. First, we seek comment on whether those states that have adopted do-not-call laws should administer those laws to the extent that they apply to intrastate telemarketing calls, while the federal law would govern interstate telemarketing.[210] Under such circumstances, we seek comment on whether the Commission should establish a regulatory scheme similar to that developed with the Commission's "slamming" rules that would allow states to "opt-in" and thereby co-administer and enforce the federal interstate do-not-call rules in their respective states.[211] Consistent with the Commission's slamming regulations, states that "opt- in" would be required to write and interpret their statutes and regulations for telemarketing calls in a manner that is

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[210] *But see* Comments and Recommendations of the Attorneys General of Alabama et al. filed with the FTC at 10.

[211] Slamming is the practice of changing a consumers presubscribed telecommunications carrier without the consumer's authorization. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, 14 FCC Rcd 1508 at 1561-64, paras. 86- 90 (1998) (*Second Report and Order*). *See also* 47 U.S.C. § 258; 47 C.F.R. § 64.1100 *et seq*.

consistent with the federal rules.[212] States would be allowed to adopt more restrictive rules for intrastate telemarketing calls if such action is necessary based on its local experiences.[213] Consumers residing in states that decided not to "opt-in" would be allowed to register with the administrator of the federal do-not-call database. These consumers would register and file do-not-call complaints regarding both unwanted intrastate and interstate telephone solicitations with the appropriate federal regulatory entity.[214]

63. We seek comment on whether this proposal is administratively feasible, including whether it is possible and/or necessary for regulators and consumers to distinguish intrastate from interstate telemarketing calls. We note that in comments filed in the FTC proceeding, the Attorneys General of all fifty states, Puerto Rico, and the Northern Mariana Islands, indicated that states have enforced their own do-not-call laws against telemarketers irrespective of whether such calls are intrastate or interstate in nature. The Attorneys General contend that states have historically enforced their consumer protection laws within, as well as across, state lines to prosecute out-of-state companies that have contacted their residents over the telephone. We seek comment on this interpretation of state authority to regulate telemarketing calls originating outside of the state.

64. Second, we seek comment on how we could work together with states that have adopted do-not-call lists. The state Attorneys General argue that the states have the

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[212] *See Second Report and Order*, 14 FCC Rcd at 1562, para. 89.

[213] *See* 47 U. S. C. § 227(e)(1).

[214] Section 2(b) provides the Commission with authority to apply section 227 to intrastate communications. *See* 47 U.S.C. § 152(b). *See also Texas v. American Blast Fax*, 121 F. Supp. 2d at 1087-89, *Minnesota v. Sunbelt Communications and Marketing*, Civil No. 02-CV-770 (D. Minn. Sept. 4, 2002).

authority to enforce their own no-call laws against telemarketers across the country.[215] Although many states have adopted laws that differ in some respects from the FTC's proposal, these differences may be reflective of the particularized circumstances of consumers and telemarketers in that state. In this context, the federal do-not-call database could act either as a default mechanism for those states that have not adopted do-not-call laws or coexist with the state do-not-call laws to provide consumers with additional safeguards.

65. Under this approach, there would be no disruption to consumers in the administration and enforcement of the state regulations as applied to interstate calls.[216] In this context, we seek comment on whether consumers in states that have adopted do-not-call laws should be restricted solely to registering on the state database or should also be allowed the option to register on any federal national do-not-call database. If consumers are allowed the option to register on both databases, we seek comment on whether the federal database should permit states to submit do-not-call requests from their own database and to obtain from the federal database any requests from their own state.[217] As noted above, states have adopted a variety of do- not- call laws, some of which may be

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[215] Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 10. *See also* New York State Consumer Protection Board Comments filed with the FTC dated March 26, 2002 at 4 (indicating that New York has jurisdiction over interstate calls provided they terminate in New York).

[216] Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 11 (indicating that more than 7 million consumers have already enrolled in state do-not-call databases).

[217] *See* 47 U.S.C. § 227(e)(2) (providing that, if the Commission requires the establishment of a national database of telephone numbers of subscribers who object to receiving telephone solicitations, a state may not, in its regulations of telephone solicitations, require the use on any database that does not include the part of such national database that relates to such state).

less restrictive of telemarketing activity than the regulations proposed by the FTC. We therefore seek comment on whether the administration of both a state and federal do-not-call database would be feasible, including whether this approach may lead to consumer confusion or duplicative administrative costs. In this regard, we seek suggestions on how the federal and state regulatory entities should coordinate their efforts, including providing adequate information to consumers.

66. Finally, we invite comment on additional proposals to reconcile the administration of any national do-not-call list with the various state lists. For example, the Commission has received inquiries regarding whether the Commission may also consider preempting the state do-not-cali statutes, in whole or in part,[218] under the theory that Congress has legislated comprehensively in this area, thus occupying the entire field of regulation and leaving no room for the states to

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[218] Section 227(e)(1) provides:

> Except for the standards prescribed under [section 227(d)] and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitations.

47 U.S.C. § 227(e)(1). *See also Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (concluding that the "savings clause" of section 227(e)(1) does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted).

supplement federal law.[219] This issue has never been addressed on the Commission level, leading to uncertainty among states and telemarketers.[220] In addition, the legislative history indicates that Congress believed the TCPA was necessary because states may lack jurisdiction to regulate interstate telemarketing calls.[221] We seek comment on whether there are any advantages to a single national database over a collection of state do-not-call laws.[222] Alternatively, we seek comment on whether the development of state do-

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[219] *See Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 (1947). For example, the TCPA's prohibitions on the use of artificial or prerecorded messages and facsimile machines apply to "any person within the United States." *See* 47 U.S.C. § 227(b)(1). In addition, section 2(a) grants the Commission jurisdiction over interstate and foreign communications. 47 U.S.C. § 152(a). While section 2(b) generally reserves to the states jurisdiction over intrastate communications, section 2(b) provides the Commission with concurrent jurisdiction over intrastate communications under section 227. *See* 47 U.S.C. § 152(b). *But see Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (concluding that "the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines.").

[220] A staff level letter did opine that "[t]he Communications Act, however, precludes Maryland from regulating or restricting interstate commerce telemarketing calls." *See* Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates, dated January 26, 1998. We note, however, that staff level letters do not necessarily speak for or bind the Commission in reviewing this issue. *See, e.g., Amor Family Broadcasting Group v. FCC*, 918 F. 2d 960, 962 (D.C. Cir. 1991); *Malkan FM Associates v. FCC*, 935 F. 2d 1313, 1319 (D.C. Cir. 1991).

[221] S. REP. NO. 102-178 at 3 (1991) (". . . over 40 States have enacted legislation limiting the use of ADRMPs (automatic dialer recorded message players) or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because States do not have jurisdiction over interstate calls."). *See also* H. R. REP. NO. 102-317 at 21 (1991).

[222] *But see* Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 8-10.

not-call lists obviates the need for a national list.[223] We also seek comment on whether preemption of state do-not-call lists would result in substantial confusion for those consumers that may have already registered in states that have adopted do-not-call lists. Similar to our discussion above, we seek comment in this context on whether the states could be allowed to "opt-in" and thereby co-administer and enforce the federal do-not-call rules in their respective states.

III. MEMORANDUM OPINION AND ORDER IN CC DOCKET 92-90

67. Since the Commission released the *1997 TCPA Reconsideration Order* in CC Docket 92-90, the telemarketing marketplace has undergone significant changes, many of them spurred by new technologies developed to advertise over the telephone network. In addition, the Commission has received thousands of complaints from consumers who allege violations of the TCPA and our rules and orders. Based on these complaints, the changes in the way telemarketing is conducted, and our decision to revisit the option of establishing a national do-not-call list, it is clear that the focus of this proceeding has changed *significantly from when the 1997* TCPA Reconsideration Order was released. Therefore, we now close and terminate CC Docket 92-90 and open a new docket to address the issues raised in this proceeding. Only pending Petitions and Requests for Clarification[224] from CC Docket 92-90 will be incorporated into the instant proceeding.

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[223] In so doing, we note that approximately one-half of the states have not adopted a do- not-call statute.

[224] *See* Requests for Clarification submitted by Robert Biggerstaff, March 14, April 11, April 12, May 1 and May 2, 2000, CC Docket No. 92- 90; A Petition for a Declaratory Ruling filed by John Holcomb, October 3, 2001, CC Docket No. 92-90.

IV. PROCEDURAL ISSUES

A. Ex Parte Presentations

68. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[225]

B. Paperwork Reduction Act

69. This NPRM contains either a proposed or modified information collection. As part of a continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

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[225] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

C. Initial Regulatory Flexibility Analysis

70. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA),[226] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic effect on small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the NPRM provided below in the Comment Filing Procedures section. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[227] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[228]

1. Need for, and Objectives of, the Proposed Rules

71. Since 1992, when the Commission adopted rules pursuant to the TCPA, telemarketing practices have changed significantly. New technologies have emerged that allow telemarketers to better target potential customers and make marketing using telephones and facsimile machines more cost-effective. At the same time, these new telemarketing techniques have heightened public concern about the effect on consumer privacy. The Commission has received numerous inquiries and complaints involving its rules on telemarketing and unsolicited fax advertisements. A growing number of states have passed or are considering legislation to establish statewide do-not-call lists, and the FTC has proposed establishing a national do-not-call registry. Congress provided in the TCPA that "individuals' privacy rights, public

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[226] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104- 21, Title II, 110 Stat. 857 (1996).

[227] *See* 5 U. S. C. § 603(a).

[228] *See id.*

safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[229] In this NPRM, we seek comment on whether the Commission's rules need to be revised in order to more effectively carry out Congress's directives in the TCPA. Specifically, we seek comment on whether to revise or clarify our rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages and telephone facsimile machines. In addition, we seek comment on the effectiveness of company-specific do-not-call lists. We also seek comment on whether the Commission should revisit its determination not to adopt a national do-not-call list. In so doing, we seek comment on the options for possible Commission action in conjunction with the FTC's proposal to adopt a national do-not-call registry for those entities over which it has jurisdiction and the proliferation of state- adopted do-not-call lists. We seek comment on these issues, as well as any alternative means of protecting consumers' privacy while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators.

2. Legal Basis

72. The legal basis for any action that may be taken pursuant to this NPRM is contained in sections 1-4, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154 and 227; and 47 C.F.R. §§ 64.1200 and 1201 of the Commission's rules.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

73. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small

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[229] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

entities that will be affected by the proposed rules, if adopted.[230] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[231] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[232] Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the Small Business Administration (SBA).[233]

74. The Commission's rules on telephone solicitation and the use of autodialers, artificial or prerecorded messages and telephone facsimile machines apply to a wide range of entities, including all telecommunications carriers and other entities that use the telephone or facsimile machine to advertise.[234] Thus, we expect that the proposals in this proceeding could have a significant economic impact on a substantial number of small entities. In 1992, there were approximately 4.44 million small business firms in the United States, according to SBA data.[235] The SBA has determined

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[230] 5 U.S.C. § 603(b)(3).

[231] 5 U.S.C. § 601(6).

[232] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[233] 15 U.S.C. § 632.

[234] 47 C.F.R. § 64.1200.

[235] U. S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject

that "telemarketing bureaus" with $6 million or less in annual receipts qualify as small businesses.[236] For 1997, there were 1,727 firms in this category, total, which operated for the entire year. Of this total, 1,536 reported annual receipts of less than $5 million.[237]

75. Determining a precise number of small entities that would be subject to the requirements proposed in this NPRM is not readily feasible. Therefore, we invite comment about the number of small business entities that would be subject to the proposed rules in this proceeding. After evaluating the comments, the Commission will examine further the effect any rule changes might have on small entities, and will set forth our findings in the final Regulatory Flexibility Analysis.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

76. We are seeking comment on whether to amend the Commission's TCPA rules and/or to revisit the option of establishing a national do-not-call list. The proposed rules will apply, with certain exceptions, to all entities making telephone solicitations or using automatic telephone dialing systems, prerecorded or artificial voice messages or telephone facsimile machines to send unsolicited advertisements. If we retain the company- specific do-not-call approach, we seek comment on whether to require companies to provide a toll-free number and/or website for consumers to register their names on the do-not-call lists. We also seek comment on whether additional measures should be taken to ensure that consumers with disabilities can register their do-not-call

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Series, Establishment and Firm Size, Table 2D, Employment Size of Firms.

[236] *See* 13 C.F.R. § 121.201.

[237] U. S. Census Bureau 1997 Economic Census, Subject Series: Information, "Employment Size of Establishments of Firms Suoject to Federal Income Tax: 1997," Table 4, NAICS code 561422 (issued October 2000).

requests. Any such measures, if adopted, may involve additional costs to businesses. If we find that establishing a national do-not-call list is warranted, we must determine the entity that will maintain the list and the procedures for administering the list. For small businesses whose call lists are not automated, scrubbing lists could be more labor-intensive and thus, more time- consuming and costly. However, we do not anticipate that such recordkeeping will require the use of professional skills, including legal and accounting expertise. In this NPRM, we seek information regarding the burdens on telemarketers to comply with a national do-not-call database,[238] including the requirements to obtain a national list of telephone numbers and to incorporate those numbers into telemarketers' individual do-not-call lists. Entities, especially small businesses, are encouraged to quantify the costs and benefits of a national do-not-call list, as well as the costs and benefits of any possible new rules regarding certain telemarketing technologies and practices. Finally, the TCPA under section 227(c)(3) provides that should the Commission adopt a national do-not-call list, common carriers shall be required to inform subscribers of the option to register on a national do-not-call list. We seek input on this proposal and any other suggestions to ensure the public is well-informed.[239]

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

77. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take

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[238] *See supra* para. 52.

[239] *See supra* para. 54.

into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[240]

78. This NPRM invites comment on a number of alternatives to modify the existing TCPA rules on telephone solicitation and the use of autodialers, artificial or prerecorded messages, and telephone facsimile machines. The Commission also will consider additional significant alternatives developed in the record. We seek comment on the effectiveness of company-specific do-not-call lists and whether the benefits of individual company lists continue to outweigh the costs to telemarketers.[241] We also seek comment on whether any network technologies have been developed over the last decade that could serve as alternatives to do-not-call lists.[242] We ask whether any such technologies are effective, universally available, and affordable to consumers in allowing consumers to curb unwanted telephone solicitations. In addition, we seek comment on a number of proposals such as requiring a maximum setting on the number of abandoned calls, requiring telemarketers to transmit caller ID information or prohibiting them from blocking such information.[243] We also ask whether revisiting the established business relationship exemption would interfere with ongoing business relationships, particularly for small businesses.[244]

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[240] 5 U.S.C. § 603(c).

[241] *See supra* para. 16.

[242] *See supra* para. 21.

[243] *See supra* para. 26.

[244] *See supra* para. 34.

79. We also seek comment on options for possible Commission action in conjunction with the FTC's proposal to establish a national do-not-call registry. A national do-not-call list might provide consumers with a one step method to avoid unwanted sales calls and assist telemarketers in identifying those consumers who do not wish to be contacted. We seek information, however, about the potential costs of establishing and maintaining a national list and about the burdens on telemarketers of complying with a national do-not-call list. Specifically, we ask whether there should be any distinctions for small businesses that must comply with a national do-not-call registry.[245] We also ask whether consumers listed on a national registry should be permitted to also provide express verifiable authorization to those businesses from whom they want to receive calls.[246]

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

80. The Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108, and the Telemarketing Sales Rule (TSR)[247] adopted by the FTC also address certain telemarketing acts or practices. The TCPA and Commission rules currently do not duplicate, overlap or conflict with the Telemarketing Act or TSR; however, there are provisions in the FTC's rules that mirror the Commission's rules, such as the calling time restrictions. It is difficult to determine at this time whether any of the proposals contained in this NPRM might conflict with any other federal rules, given that the FTC has undertaken a rulemaking proceeding of its own. Therefore, we ask in the NPRM whether any inconsistencies at the end of the rulemakings would create confusion regarding the applicability

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[245] *See supra* para. 52.

[246] *See supra* para. 58.

[247] 16 C.F.R. part 310.

and enforcement of the do-not-call requirements to certain entities.[248] For instance, the FTC proposes to extend its do-not-call requirements to telemarketing calls from "for-profit entities" that solicit charitable contributions; the Commission has concluded that its regulations apply only to commercial calls. The FTC's proposal also appears to allow some business and wireless telephone subscribers to register on the national database, while the TCPA grants authority to the Commission to establish a national database only for residential subscribers. Therefore, the Commission invites comment in this NPRM on whether we could adopt any new rules or revise any of our existing rules to remain consistent with the FTC's proposals.[249]

D. Filing of Comments and Reply Comments

81. We invite comment on the issues and questions set forth above. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 45 days after publication in the Federal Register, and reply comments on or before 60 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

82. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http:// www.fcc.gov/e-file/ecfs. html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the

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[248] *See supra* para. 56.

[249] *See supra* para. 58.

comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first- class or overnight U S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand- delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8: 00 a.m. to 7: 00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first- class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties also should send four (4) paper copies of their filings to Kelli Farmer, Federal Communications Commission, Room 4-C740, 445 12th Street, S.W., Washington, DC 20554.

83. Written comments by the public on the proposed and/ or modified information collections are due on or before 45 days after the date of publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/ or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17 th Street, N. W., Washington, D. C. 20503 or via the Internet to edward.springer@omb.eop.gov.

84. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418- 7365, or at bmillin@fcc.gov.

V. ORDERING CLAUSES

85. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154 and 227; and 47 C.F.R. §§ 64.1200 and 1201 of the Commission's rules, the NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

86. IT IS FURTHER ORDERED that the proceedings in CC Docket 92-90 ARE TERMINATED, and the docket is closed.

87.IT IS FUTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of

Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90

As I have stated on many occasions, maximizing consumer welfare and protecting consumer interests are key Commission priorities. The Commission achieves these ends, in part, by creating market policy that allows innovation to bring new and improved telecommunications products and services to all Americans, while balancing the rights of consumers. We also seek to empower consumers directly by providing them information they can use to make educated decisions in a marketplace where the options can sometimes be daunting.

Today, the Commission takes an important step in adding to its substantial record of consumer-oriented policy and outreach initiatives. Given the number of consumer inquiries and complaints about telemarketing the Commission has received, and in light of technological and market changes, we have determined that it is time to review the rules under the Telephone Consumer Protection Act (TCPA) of 1991 on unsolicited advertising using telephones and facsimile machines. This item also seeks comment on the establishment of a national do-not-call list that would cover most telemarketing calls, an issue that the Commission last considered a decade ago. In particular, the item asks about possible FCC actions that could complement the Federal Trade Commission's proposal to establish and administer a national do-not-call list.

Since the TCPA was adopted, telemarketing practices have changed significantly, the number of telemarketing calls received by consumers has increased exponentially, and the technologies used by telemarketers have become more sophisticated. Therefore, the rulemaking proposed today is

timely in considering whether consumers are adequately protected against unlimited unsolicited advertising, as contemplated by the TCPA. In reviewing our rules, we must balance this consumer interest against the burdens on telemarketers and their interest in conducting legitimate telemarketing.

Consumer policy efforts like this one are complemented by the Commission's outreach and *education initiatives*, which include producing fact sheets, consumer alerts, and consumer forums and making concise, reader-friendly information available on the Commission Web site and through our Consumer Centers. Other recent consumer-related FCC activities include:

(1) Proposing to extend the Commission's informal complaint rules to encompass all entities we regulate, not just telephone service providers. If this item is adopted, a consumer will be able to file a complaint with the Commission and receive a response from the company in question.

(2) Permitting reimbursement from the interstate Telecommunication Relay Service (TRS) fund in a way that persons with disabilities who use Internet- based TRS access can initiate calls from their computers rather than having to purchase TTY (teletypewriter/ text telephone) devices.

(3) Educating consumers through our "Get Connected: Afford-A-Phone" national outreach campaign about Link-Up America and Lifeline Assistance, programs that provide discounts on initial telephone installation and basic monthly telephone service for qualifying low-income consumers.

(4) Producing a brochure in 13 languages that explains consumer options for saving money on international long distance telephone calls.

Today's telemarketing item and the initiatives enumerated above are only several of our recent actions designed to serve consumers of telecommunications goods and services. The American public can be confident that the Commission will continue to advance consumer value through its policies and programs.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

In re: Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 and CC Docket No. 92-90, Notice of Proposed Rulemaking and Memorandum Opinion and Order

I fully support today's Notice to re-examine our implementation of the Telephone Consumer Protection Act. Since I became a Commissioner, I have repeatedly emphasized the obligations of this Commission to protect consumers from irresponsible business practices. While I continue to believe that markets more effectively deliver consumer benefits than regulation ever can, a regulatory agency takes on additional specific responsibilities in a competitive market that never existed under a monopoly regime. The Commission must rise to the challenge of a regulatory agency in a competitive age and today's decision is a positive step in that direction.[1]

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[1] Kathleen Q. Abernathy, *A Regulatory Agency for a Competitive Age: Harnessing the Chaos*, Commissioner's remarks at May 22, 2002 Press Breakfast, available at http://www fcc.gov/Speeches/Abernathy/2002/spkqa213.html ("We must continually refine our mission at the Commission to best respond to changed conditions."). *My View from the Doorstep of FCC Change*, 54 Fed. Comm. L.J. 2, 202 (2002) ("Unsolicited faxes certainly do not grab headlines in the way free political advertising does, but that is not the standard by which we should assess the FCC's job performance. Therefore, I believe that the Commission should devote additional resources to enforce our rule prohibiting unsolicited faxes. I have been heartened by the Commission's increased enforcement efforts in this area over the past few years. In addition, the FCC should step up its efforts to inform consumers of their rights under the TCPA. Only with these efforts will the Commission fulfill the statutory mandate and the prioritization inherent in the TCPA.").

As previously stated,[2] the protections created by the TCPA are among the most important activities this Commission undertakes to improve the daily lives of the public. I will continue to work with my fellow Commissioners and our Consumer and Governmental Affairs Bureau to ensure that the American people are fully aware of their rights under the Act and the Commission's efforts to enforce our rules. In this regard, I have been particularly heartened by recent tough enforcement action taken against unsolicited fax advertisers.[3] We are fully committed to increasing public awareness about these rules and strictly enforcing them.

Today's Notice takes our efforts to another level. It has been 10 years since the Commission promulgated rules under the TCPA. In the intervening decade, there have been tremendous changes in both the communications capabilities of everyday Americans and the tools available to marketers. We have an obligation to examine those changes and adapt our rules to that new reality. I have followed the efforts of the FTC in re-examining their rules and I support our similar action today. In examining these issues, I am particularly concerned about the burdens imposed on consumers to express—on a company-by-company basis—their desire to be placed on a do-not-call list. In light of the technological tools now available, I believe the time has come to examine the effectiveness of a national do-not-call list. Current state policy efforts, implementation issues, and the efforts of private parties will each inform my consideration of these

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[2] Kathleen Q. Abernathy, *Do-Not-Call Lists*, 2 Focus on Consumer Concerns 1, (January–February 2002) available at http:// www. fcc. gov/ commissioners/ abernathy/ news/ donotcall. html.

[3] See Fax. com Apparent Liability for Forfeiture, File No. EB-02-TC-120 (released August 7, 2002) (Issuing a Notice of Apparent Liability in the amount of $5,379,000). 21st Century Faxes Ltd., Forfeiture Order, File No. EB-00-TC-174, 17 FCC Rec. 1384 (released January 11, 2002) (Issuing a Forfeiture in the amount of $1,107,500).

issues. However, I am committed to using the full resources of this Commission to ensure that consumers have a reliable and simple way to stop undesired telemarketing calls.

I am also increasingly concerned about the possibility of telemarketing calls to wireless phones by autodialers or using prerecorded messages. There have been sporadic reports of violations of our current ban on such calls. The Commission will continue to vigorously enforce this ban. However, as technology evolves, we must remain vigilant that such calls not take place. I am particularly concerned that when local number portability is implemented for wireless devices late in 2003, telemarketers will not be able to readily distinguish landline phone numbers from wireless numbers. The marketing industry, carriers, consumers, and the Commission will need to work together to develop solutions that implement our bar against wireless calls from autodialers and the use of prerecorded messages even after local number portability is a reality.

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278; CC Docket No. 92-90

I commend the Chairman and Bureau staff for their effort to craft this Notice that seeks comment on how we can more effectively protect consumers from unwanted telephone solicitations and facsimile transmissions. I also support the inquiry on whether to revisit the option of establishing a national do-not-call list and, to what extent, we should supplement the Federal Trade Commission's pending proposal to adopt a national do-not-call list.

With the development of more effective telemarketing practices during the past decade, American consumers are now faced with a greater amount of unwanted solicitations on their telephones and fax machines. The frequency of these solicitations has become an unwanted interruption in the busy lives of the American family. Today, we begin the process to give the American consumer additional tools to stem the tide of these unwanted solicitations. I am pleased to support another Commission decision that engages our authority to protect consumers by modifying our rules to address evolving business practices, changing marketplace conditions, and technological innovation.

I am also pleased to note that the proceeding we launch today does not seek to alter in any way the existing exemption from the telemarketing restrictions for entities involved in political or religious speech. Protecting free and unfettered political and religious speech is critical to our democracy. In my view, the risk of any actual or perceived infringement on political and religious dis-

course outweighs whatever speculative benefits may be obtained from imposing additional regulatory restrictions on such activity.

APPENDIX K

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6101. Findings

The Congress makes the following findings:

(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose $40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

CREDIT(S)

(Pub.L. 103-297, § 2, Aug. 16, 1994, 108 Stat. 1545.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1994 Acts. House Report No. 103-20, see 1994 U.S. Code Cong. and Adm. News, p. 1626.

Short Title

2001 Amendments. Pub.L. 107-56, Title X, § 1011(a), Oct. 26, 2001, 115 Stat. 396, provided that: "This section [amending sections 6102 and 6106 of this title and sections 917 and 2325 of Title 18] may be cited as the 'Crimes Against Charitable Americans Act of 2001'."

1994 Acts. Section 1 of Pub.L. 103-297 provided that: "This Act [enacting this chapter and section 9b of Title 7, Agriculture, and amending section 52(a) of this title] may be cited as the 'Telemarketing and Consumer Fraud and Abuse Prevention Act'."

The Do-Not-Call Implementation Act

Pub.L. 108-10, §§ 1 to 4, Mar. 11, 2003, 117 Stat. 557, provided that:

"Section 1. Short title.

"This Act [this note] may be cited as the 'Do-Not-Call Implementation Act'.

"Sec. 2. Telemarketing Sales Rule; do-not-call registry fees.

"The Federal Trade Commission may promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the 'do-not-call' registry of the Telemarketing Sales Rule (16 CFR 310.4(b)(1)(iii)), promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101 et seq.) [Pub.L. 103-297, Aug. 16, 1994, 108 Stat. 1545, which enacted chapter 87 of this title, 15 U.S.C.A. § 6101 et seq.]. Such regulations shall be promulgated in accordance with section 553 of

title 5, United States Code. Fees may be collected pursuant to this section for fiscal years 2003 through 2007, and shall be deposited and credited as offsetting collections to the account, Federal trade Commission—Salaries and Expenses, and shall remain available until expended. No amounts shall be collected as fees pursuant to this section for such fiscal years except to the extent provided in advance in appropriations Acts. Such amounts shall be available for expenditure only to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement.

"Sec. 3. Federal Communications Commission do-not-call regulations.

"Not later than 180 days after the date of enactment of this Act [Mar. 11, 2003], the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002, under the Telephone Consumer Protection Act [Telephone Consumer Protection Act of 1991 (TCPA), Pub.L. 102-243, Dec. 20, 1991, 105 Stat. 2394] (47 U.S.C. 227 et seq.). In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b)).

"Sec. 4. Reporting requirements.

"(a) Report on regulatory coordination.—Within 45 days after the promulgation of a final rule by the Federal Communications Commission as required by section 3 [of this note], the Federal Trade Commission and the Federal Communications Commission shall each transmit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report which shall include—

"(1) an analysis of the telemarketing rules promulgated by both the Federal Trade Commission and the Federal Communications Commission;

"(2) any inconsistencies between the rules promulgated by each such Commission and the effect of any such inconsistencies on consumers, and persons paying for access to the registry; and

"(3) proposals to remedy any such inconsistencies.

"(b) Annual report.—For each of fiscal years 2003 through 2007, the Federal Trade Commission and the Federal Communications Commission shall each transmit an annual report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report which shall include—

"(1) an analysis of the effectiveness of the 'do-not-call' registry as a national registry;

"(2) the number of consumers who have placed their telephone numbers on the registry;

"(3) the number of persons paying fees for access to the registry and the amount of such fees;

"(4) an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States;

"(5) an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with the enforcement activities of the Federal Communications Commission pursuant to the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.); and

"(6) a review of the enforcement proceedings under the Telemarketing Sales Rule (16 CFR 310), in the case of the

Federal Trade Commission, and under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.), in the case of the Federal Communications Commission."

Protecting Seniors from Fraud

Pub.L. 106-534, §§ 1 to 4, Nov. 22, 2000, 114 Stat. 2555, provided that:

"Sec. 1. Short title.

"This Act [enacting this note and provisions set out as notes under section 3732 of Title 42] may be cited as the 'Protecting Seniors From Fraud Act'.

"Sec. 2. Findings.

"Congress makes the following findings:

"(1) Older Americans are among the most rapidly growing segments of our society.

"(2) Our Nation's elderly are too frequently the victims of violent crime, property crime, and consumer and telemarketing fraud.

"(3) The elderly are often targeted and retargeted in a range of fraudulent schemes

"(4) The TRIAD program, originally sponsored by the National Sheriffs' Association, International Association of Chiefs of Police, and the American Association of Retired Persons unites sheriffs, police chiefs, senior volunteers, elder care providers, families, and seniors to reduce the criminal victimization of the elderly.

"(5) Congress should continue to support TRIAD and similar community partnerships that improve the safety and quality of life for millions of senior citizens.

"(6) There are few other community-based efforts that forge partnerships to coordinate criminal justice and social

service resources to improve the safety and security of the elderly.

"(7) According to the National Consumers League, telemarketing fraud costs consumers nearly $40,000,000,000 each year.

"(8) Senior citizens are often the target of telemarketing fraud.

"(9) Fraudulent telemarketers compile the names of consumers who are potentially vulnerable to telemarketing fraud into the so-called 'mooch lists'.

"(10) It is estimated that 56 percent of the names on such 'mooch lists' are individuals age 50 or older.

"(11) The Federal Bureau of Investigation and the Federal Trade Commission have provided resources to assist private-sector organizations to operate outreach programs to warn senior citizens whose names appear on confiscated 'mooch lists'.

"(12) The Administration on Aging was formed, in part, to provide senior citizens with the resources, information, and assistance their special circumstances require.

"(13) The Administration on Aging has a system in place to inform senior citizens of the dangers of telemarketing fraud.

"(14) Senior citizens need to be warned of the dangers of telemarketing fraud before they become victims of such fraud.

"Sec. 3. Senior Fraud Prevention Program.

"(a) Authorization of appropriations.—There is authorized to be appropriated to the Attorney General $1,000,000 for each of the fiscal years 2001 through 2005 for programs for the National Association of TRIAD.

"(b) Comptroller general.—The Comptroller General of the United States shall submit to Congress a report on the effectiveness of the TRIAD program 180 days prior to the expiration of the authorization under this Act [enacting this note and provisions set out as notes under section 3732 of Title 42], including an analysis of TRIAD programs and activities; identification of impediments to the establishment of TRIADs across the Nation; and recommendations to improve the effectiveness of the TRIAD program.

"Sec. 4. Dissemination of Information.

"(a) In general.—The Secretary of Health and Human Services, acting through the Assistant Secretary of Health and Human Services for Aging, shall provide to the Attorney General of each State and publicly disseminate in each State, including dissemination to area agencies on aging, information designed to educate senior citizens and raise awareness about the dangers of fraud, including telemarketing and sweepstakes fraud.

"(b) Information.—In carrying out subsection (a), the Secretary shall—

"(1) inform senior citizens of the prevalence of telemarketing and sweepstakes fraud targeted against them;

"(2) inform senior citizens how telemarketing and sweepstakes fraud work;

"(3) inform senior citizens how to identify telemarketing and sweepstakes fraud;

"(4) inform senior citizens how to protect themselves against telemarketing and sweepstakes fraud, including an explanation of the dangers of providing bank account, credit card, or other financial or personal information over the telephone to unsolicited callers;

"(5) inform senior citizens how to report suspected attempts at or acts of fraud;

"(6) inform senior citizens of their consumer protection rights under Federal law; and

"(7) provide such other information as the Secretary considers necessary to protect senior citizens against fraudulent telemarketing and sweepstakes promotions.

"(c) Means of dissemination.—The Secretary shall determine the means to disseminate information under this section. In making such determination, the Secretary shall consider—

"(1) public service announcements;

"(2) a printed manual or pamphlet;

"(3) an Internet website;

"(4) direct mailings; and

"(5) telephone outreach to individuals whose names appear on so-called 'mooch lists' confiscated from fraudulent marketers.

"(d) Priority.—In disseminating information under this section, the Secretary shall give priority to areas with high incidents of fraud against senior citizens."

15 U.S.C.A. § 6101, 15 USCA § 6101

Current through P.L. 108-223 approved April 30, 2004.

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6102. Telemarketing rules

(a) In general

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

(2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices—

(A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,

(B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers,

(C) a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services;[1] and

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[1] So in original. The semicolon probably should be a comma.

(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

In prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements.

(b) Rulemaking

The Commission shall prescribe the rules under subsection (a) of this section within 365 days after August 16, 1994. Such rules shall be prescribed in accordance with section 553 of Title 5.

(c) Enforcement

Any violation of any rule prescribed under subsection (a) of this section shall be treated as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices.

(d) Securities and Exchange Commission rules

(1) Promulgation

(A) In general

Except as provided in subparagraph (B), not later than 6 months after the effective date of rules promulgated by the Federal Trade Commission under subsection (a) of this section, the Securities and Exchange Commission shall promulgate, or require any national securities exchange or registered securities association to promulgate, rules substantially similar to such rules to prohibit deceptive and other abusive

telemarketing acts or practices by persons described in paragraph (2).

(B) Exception

The Securities and Exchange Commission is not required to promulgate a rule under subparagraph (A) if it determines that—

(i) Federal securities laws or rules adopted by the Securities and Exchange Commission thereunder provide protection from deceptive and other abusive telemarketing by persons described in paragraph (2) substantially similar to that provided by rules promulgated by the Federal Trade Commission under subsection (a) of this section; or

(ii) such a rule promulgated by the Securities and Exchange Commission is not necessary or appropriate in the public interest, or for the protection of investors, or would be inconsistent with the maintenance of fair and orderly markets.

If the Securities and Exchange Commission determines that an exception described in clause (i) or (ii) applies, the Securities and Exchange Commission shall publish in the Federal Register its determination with the reasons for it.

(2) Application

(A) In general

The rules promulgated by the Securities and Exchange Commission under paragraph (1)(A) shall apply to a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company, or any individual associated with a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company. The rules promulgated by the Federal Trade Commission under subsec

tion (a) of this section shall not apply to persons described in the preceding sentence.

(B) Definitions

For purposes of subparagraph (A)—

(i) the terms "broker", "dealer", "transfer agent", "municipal securities dealer", "municipal securities broker", "government securities broker", and "government securities dealer" have the meanings given such terms by paragraphs (4), (5), (25), (30), (31), (43), and (44) of section 78c(a) of this title;

(ii) the term "investment adviser" has the meaning given such term by section 80b-2(a)(11) of this title; and

(iii) the term "investment company" has the meaning given such term by section 80a-3(a) of this title.

(e) Commodity Futures Trading Commission rules

(1) Application

The rules promulgated by the Federal Trade Commission under subsection (a) of this section shall not apply to persons described in section 9b(1) of Title 7.

(2) Omitted

CREDIT(S)

(Pub.L. 103-297, § 3, Aug. 16, 1994, 108 Stat. 1545; Pub.L. 107-56, Title X, § 1011(b)(1), (2), Oct. 26, 2001, 115 Stat. 396.)

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6103. Actions by States

(a) In general

Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with such rule of the Commission, to obtain damages, restitution, or other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice

The State shall serve prior written notice of any civil action under subsection (a) or (f)(2) of this section upon the Commission and provide the Commission with a copy of its complaint, except that if it is not feasible for the State to provide such prior notice, the State shall serve such notice immediately upon instituting such action. Upon receiving a notice respecting a civil action, the Commission shall have the right (1) to intervene in such action, (2) upon so intervening, to be heard on all matters arising therein, and (3) to file petitions for appeal.

(c) Construction

For purposes of bringing any civil action under subsection (a) of this section, nothing in this chapter shall prevent an

attorney general from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(d) Actions by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 6102 of this title, no State may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action under subsection (a) or (f)(2) of this section against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(e) Venue; service of process

Any civil action brought under subsection (a) of this section in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of Title 28. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

(f) Actions by other State officials

(1) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

(2) In addition to actions brought by an attorney general of a State under subsection (a) of this section, such an action may be brought by officers of such State who are authorized by the State to bring actions in such State on behalf of its residents.

CREDIT(S)

(Pub.L. 103-297, § 4, Aug. 16, 1994, 108 Stat. 1548.)

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6104. Actions by private persons

(a) In general

Any person adversely affected by any pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, or an authorized person acting on such person's behalf, may, within 3 years after discovery of the violation, bring a civil action in an appropriate district court of the United States against a person who has engaged or is engaging in such pattern or practice of telemarketing if the amount in controversy exceeds the sum or value of $50,000 in actual damages for each person adversely affected by such telemarketing. Such an action may be brought to enjoin such telemarketing, to enforce compliance with any rule of the Commission under section 6102 of this title, to obtain damages, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice

The plaintiff shall serve prior written notice of the action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the person shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(c) Action by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under

section 6102 of this title, no person may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(d) Cost and fees

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party.

(e) Construction

Nothing in this section shall restrict any right which any person may have under any statute or common law.

(f) Venue; service of process

Any civil action brought under subsection (a) of this section in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of Title 28. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

CREDIT(S)

(Pub.L. 103-297, § 5, Aug. 16, 1994, 108 Stat. 1549.)

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6105. Administration and applicability of chapter

(a) In general

Except as otherwise provided in sections 6102(d), 6102(e), 6103, and 6104 of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.). Consequently, no activity which is outside the jurisdiction of that Act shall be affected by this chapter.

(b) Actions by Commission

The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter.

(c) Effect on other laws

Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

CREDIT(S)

(Pub.L. 103-297, § 6, Aug. 16, 1994, 108 Stat. 1549.)

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6106. Definitions

For purposes of this chapter:

(1) The term "attorney general" means the chief legal officer of a State.

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which—

(A) contains a written description, or illustration of the goods or services offered for sale,

(B) includes the business address of the seller,

(C) includes multiple pages of written material or illustrations, and

(D) has been issued not less frequently than once a year, where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

CREDIT(S)

(Pub.L. 103-297, § 7, Aug. 16, 1994, 108 Stat. 1550; Pub.L. 107-56, Title X, § 1011(b)(3), Oct. 26, 2001, 115 Stat. 396.)

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6107. Enforcement of orders

(a) General authority

Subject to subsections (b) and (c) of this section, the Federal Trade Commission may bring a criminal contempt action for violations of orders of the Commission obtained in cases brought under section 53(b) of this title.

(b) Appointment

An action authorized by subsection (a) of this section may be brought by the Federal Trade Commission only after, and pursuant to, the appointment by the Attorney General of an attorney employed by the Commission, as a special assistant United States Attorney.

(c) Request for appointment

(1) Appointment upon request or motion

A special assistant United States Attorney may be appointed under subsection (b) of this section upon the request of the Federal Trade Commission or the court which has entered the order for which contempt is sought or upon the Attorney General's own motion.

(2) Timing

The Attorney General shall act upon any request made under paragraph (1) within 45 days of the receipt of the request.

(d) Termination of authority

The authority of the Federal Trade Commission to bring a criminal contempt action under subsection (a) of this section

expires 2 years after the date of the first promulgation of rules under section 6102 of this title. The expiration of such authority shall have no effect on an action brought before the expiration date.

CREDIT(S)

(Pub.L. 103-297, § 9, Aug. 16, 1994, 108 Stat. 1550.)

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 87—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 U.S.C.A. § 6108. Review

Upon the expiration of 5 years following the date of the first promulgation of rules under section 6102 of this title, the Commission shall review the implementation of this chapter and its effect on deceptive telemarketing acts or practices and report the results of the review to the Congress.

CREDIT(S)

(Pub.L. 103-297, § 10, Aug. 16, 1994, 108 Stat. 1551.)

UNITED STATES CODE ANNOTATED

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART I—COMMON CARRIER REGULATION

47 U.S.C.A. § 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of

any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement; and

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as

local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone

exchange service of the opportunity to provide notification, in accordance with regulations established under this para graph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directo-

ries are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the

identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve

such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 227, as added Dec. 20, 1991, Pub.L. 102- 243, § 3(a), 105 Stat. 2395, and amended Oct. 28, 1992, Pub.L. 102-556, Title IV, § 402, 106 Stat. 4194; Oct. 25, 1994, Pub.L. 103-414, Title III, § 303(a)(11), (12), 108 Stat. 4294; Dec. 16, 2003, Pub.L. 108-187, § 12, 117 Stat. 2717.)

CODE OF FEDERAL REGULATIONS

TITLE 47—TELECOMMUNICATION

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

SUBCHAPTER B—COMMON CARRIER SERVICES

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

SUBPART L—RESTRICTIONS ON TELEMARKETING AND TELEPHONE SOLICITATION

47 C.F.R. § 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call,

(i) Is made for emergency purposes,

(ii) Is not made for a commercial purpose,

(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,

(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made, or

(v) Is made by or on behalf of a tax-exempt nonprofit organization.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine,

(Text of subsection (a)(3)(i) effective Jan. 1, 2005).

(i) For purposes of paragraph (a)(3) of this section, a facsimile advertisement is not "unsolicited" if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.

(ii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(5) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to

a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(ii) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(6) of this section.

(7) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation

Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(9) of this section, to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process; and

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or

entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the

call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(3) The term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

Note to paragraph (f)(3): Paragraph 64.1200(f)(3) is stayed as of October 14, 2003, as it applies to the time limitations on facsimile advertisements. The Federal Communications Commission will publish a document in the Federal Register when the stay is lifted.

(4) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(5) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(6) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(7) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(9) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(10) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(11) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

[57 FR 53293, Nov. 9, 1992; 60 FR 42069, Aug. 15, 1995; 68 FR 44177, July 25, 2003; 68 FR 50978, Aug. 25, 2003; 68 FR 56764, Oct. 1, 2003; 68 FR 59131, Oct. 14, 2003]

CODE OF FEDERAL REGULATIONS

TITLE 16—COMMERCIAL PRACTICES

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS

PART 310—TELEMARKETING SALES RULE

16 C.F.R. § 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

CODE OF FEDERAL REGULATIONS

TITLE 16—COMMERCIAL PRACTICES

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS

PART 310—TELEMARKETING SALES RULE

16 C.F.R. § 310.2 Definitions.

(a) Acquirer means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) Attorney General means the chief legal officer of a state.

(c) Billing information means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) Caller identification service means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) Cardholder means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) Charitable contribution means any donation or gift of money or any other thing of value.

(g) Commission means the Federal Trade Commission.

(h) Credit means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) Credit card sales draft means any record or evidence of a credit card transaction.

(k) Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) Customer means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) Donor means any person solicited to make a charitable contribution.

(n) Established business relationship means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) Free-to-pay conversion means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) Investment opportunity means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) Material means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) Merchant means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) Merchant agreement means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) Negative option feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) Outbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) Person means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) Preacquired account information means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or

donor during the telemarketing transaction pursuant to which the account will be charged.

(x) Prize means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) Prize promotion means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) Seller means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) State means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year,

when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) Upselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

CODE OF FEDERAL REGULATIONS

TITLE 16—COMMERCIAL PRACTICES

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS

PART 310—TELEMARKETING SALES RULE

16 C.F.R. § 310.3 Deceptive telemarketing acts or practices.

(a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays[1] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[2]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement inform-

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[1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

[2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

ing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authori-

zation, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[4] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[5]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or

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[3] Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR part 226.

[4] Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq., and Regulation E, 12 CFR part 205.

[5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) Assisting and facilitating. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) Credit card laundering. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) Prohibited deceptive acts or practices in the solicitation of charitable contributions. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

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TITLE 16—COMMERCIAL PRACTICES

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS

PART 310—TELEMARKETING SALES RULE

Current through April 30, 2004; 69 FR 24054

16 C.F.R. § 310.4 Abusive telemarketing acts or practices.

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented

to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be

charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) Pattern of calls.

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(Compliance date of subsection (b)(1)(iii)(B) is (date pending).

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[6] of that person; or

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

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[6] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(Text of subsection (b)(3)(iv) effective until Jan. 1, 2005).

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(Text of subsection (b)(3)(iv) effective Jan. 1, 2005).

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[7]; and

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[7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) Calling time restrictions. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) Required oral disclosures in the sale of goods or services. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) Required oral disclosures in charitable solicitations. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

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PART 310—TELEMARKETING SALES RULE

16 C.F.R. § 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[8]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

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[8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

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PART 310—TELEMARKETING SALES RULE

Current through April 30, 2004; 69 FR 24054

16 C.F.R. § 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, provided, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, provided, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable

office or cleaning supplies; provided, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

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16 C.F.R. § 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

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PART 310—TELEMARKETING SALES RULE

16 C.F.R. § 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $25 per area code of data accessed, up to a maximum of $7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $25 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency

that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

[68 FR 45144, July 31, 2003]

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16 C.F.R. § 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

Supreme Court, U.S.
FILED
JUL 19 2004
OFFICE OF THE CLERK

No. 03-1552

In the Supreme Court of the United States

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the nationwide "do-not-call registry" regulations, which establish a database of consumers who do not wish to receive commercial telemarketing calls and which prohibit commercial telemarketers from soliciting via telephone consumers who voluntarily list themselves on this database, violate the First Amendment rights of commercial telemarketers.

2. Whether Federal Trade Commission regulations that establish a fee for commercial access to the nationwide do-not-call registry "to offset the costs of activities and services related to the implementation and enforcement" of the registry violate the First Amendment.

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In the Supreme Court of the United States

No. 03-1552

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 358 F.3d 1228. The memorandum opinion and order of the district court (Pet. App. 80a-112a) is reported at 283 F. Supp. 2d 1151.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2004. The petition for a writ of certiorari was filed on May 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory and Regulatory Background*

Over the past two decades, telemarketing—inducing the purchase of goods or services through telephone solicitation—has become a multi-billion dollar business. It has also become a growing intrusion into everyday life. In the last decade, telemarketers have increased their calls "fivefold," to as many as 104 million calls a day. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14,014, 14,054 para. 66 (2003) (Report and Order). Over the course of that decade, Congress, the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC) have sought to address the problems associated with telemarketing, culminating in the nationwide do-not-call registry that petitioners seek to challenge here.

a. *The Telephone Consumer Protection Act of 1991 and the FCC's implementing regulations*

In the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 3(a), 105 Stat. 2395 (47 U.S.C. 227), Congress first attempted to address the "intrusive invasion of privacy" and the "outrage[]" expressed by consumers "over the proliferation of intrusive, nuisance calls to their homes from telemarketers." 47 U.S.C. 227 note. The TCPA directed the FCC to prescribe rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. 227(c)(1). In particular, Congress required the FCC to "compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special

directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their costs and other advantages and disadvantages." 47 U.S.C. 227(c)(1)(A). In addition, the TCPA authorized the FCC to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. 227(c)(3).

The TCPA did not apply to every telemarketing call, only "telephone solicitations"—"the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. 227(a)(3). The TCPA's definition of "telephone solicitations" excludes calls by tax exempt nonprofit organizations, commercial solicitors calling with the consumer's "prior express permission", and any telemarketer with whom the consumer "has an established business relationship." 47 U.S.C. 227(a)(3)(A) and (B).

With respect to the exclusion of tax-exempt nonprofit organizations, Congress concluded that the record before it did "not contain sufficient evidence to demonstrate that calls from [such] organizations should be subject to the [statute's] restrictions." H.R. Rep. No. 317, 102d Cong., 1st Sess. 16 (1991). To the contrary, "[c]omplaint statistics show[ed] that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." *Ibid.* (citing poll conducted by National Association of Consumer Agency Administrators). Congress nonetheless directed the FCC to consider whether it should restrict such telephone solicitations in the future. 47 U.S.C. 227(c)(1)(D).

In 1992, the FCC adopted regulations implementing the TCPA. The primary feature of these regulations was a "company-specific do-not-call" requirement (company-specific requirement), which mandated that commercial telemarketers maintain a list of residential telephone subscribers who request not to be called and that telemarketers honor those requests. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 8765-8766 paras. 23-24 (1992); 47 C.F.R. 64.1200(c)(2). The FCC declined to create a nationwide do-not-call registry, in part, because it found that such a database "would be costly and difficult to establish and maintain in a reasonably accurate form" at that time. 7 F.C.C.R. at 8760-8761 paras. 14-15.

b. *The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 and the FTC's implementing regulations*

Three years later, Congress addressed the related problem of "[i]nterstate telemarketing fraud" in the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA), 15 U.S.C. 6101(2). The TCFAPA required the FTC to prescribe rules prohibiting "deceptive" or "other abusive" telemarketing practices, 15 U.S.C. 6102(a)(1), such as undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. 6102(a)(3)(A). Like the TCPA, the TCFAPA regulated only commercial telephone solicitations. 15 U.S.C. 6106(4).[1] Congress further limited the FTC to regu-

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[1] In 2001, the USA PATRIOT Act, Pub. L. No. 107-56, § 1011, 115 Stat. 396, expanded the TCFAPA's definition of telemarketing

lating only those solicitations already within its jurisdiction. See 15 U.S.C. 6105(a).

The FTC regulations implementing the TCFAPA, see 60 Fed. Reg. 43,842 (1995), prohibit various deceptive telemarketing practices, like using "[t]hreats, intimidation, or * * * profane or obscene language," or "[m]aking a false or misleading statement to induce any person to pay for goods or services." 16 C.F.R. 310.3(a)(3)(iii)(B)(4), 310.4(a)(1) (2003). In addition, the regulations establish a "company-specific do-not-call" requirement prohibiting telemarketers from soliciting "a person when that person previously has stated that he or she does not wish" to be called. 16 C.F.R. 310.4(b)(1)(ii) (2003). Consistent with the FTC's limited jurisdiction, the regulations apply only to interstate telemarketing of goods and services, and not to telemarketing by non-profit organizations, banks, or common carriers.

c. ***The 2003 FTC regulations establishing a do-not-call registry***

In 2002, after reviewing the effectiveness of its regulations implementing the TCFAPA, the FTC published a notice of proposed rulemaking to establish a national "do-not-call" registry for consumers who voluntarily wish to limit the number of telemarketing calls they receive. 67 Fed. Reg. 4516-4520. The notice elicited a remarkable outpouring of public sentiment: the FTC received over 64,000 comments from potentially affected businesses, academics, privacy advocates, and individuals—the vast majority of which supported the creation of a national do-not-call registry. 68 Fed. Reg. 4582, 4628 (2003).

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to encompass telemarketing by for-profit entities on behalf of charities.

On January 29, 2003, the FTC issued regulations creating a national do-not-call registry, which are at issue here. See 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)(B)) Under those regulations, telemarketers may not "[i]nitiat[e] any outbound telephone call to a person" if:

> (A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or
>
> (B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services.

69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)).

Thus, the FTC's regulations establish a company-specific requirement for telemarketers soliciting on behalf of commercial or charitable organizations.[2] In addition, they prohibit commercial telemarketers from placing an outbound call to individuals listed on the nationwide do-not-call registry, unless the telemarketer "has obtained the express" consent of the person it is calling, or "has an established business relationship

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[2] A suit challenging the portion of 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)(A)) that prohibits telemarketers for charitable organizations from calling individuals who have expressed a desire not to be called is currently pending before the Fourth Circuit. See *National Fed'n of the Blind* v. *FTC*, 303 F. Supp. 2d 707 (D. Md. 2004), appeal pending, No. 04-1378.

with such person." 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)(B)(i) and (ii)). Finally, the regulations provide that telemarketers may gain access to the nationwide do-not-call registry for a fixed fee that is calculated based on the number of area codes the telemarketer accesses. 68 Fed. Reg. at 4628-4641.

These new regulations were, in the FTC's view, necessary in light of the company-specific requirement's shortcomings. The company-specific approach was "extremely burdensome" to consumers because it required them to "repeat their 'do-not-call' request with every telemarketer that calls." 68 Fed. Reg. at 4629. Telemarketers also ignored do-not-call requests; consumers could not verify that they had been removed from a telemarketer's list; and, consumer litigation to enforce the requirement was "complex and time-consuming." *Ibid.* Indeed, 27 States had established statewide do-not-call lists because the existing regulations had "proven ineffective." *Id.* at 4629, 4630.

The FTC explained its decision to exclude charitable solicitation calls from the do-not-call registry restrictions, but not the company-specific requirement, on the ground that the record reflected great public dissatisfaction with commercial solicitations. 68 Fed. Reg. at 4629-4631. In addition, due to "fundamental differences between commercial solicitations and charitable solicitations," the FTC concluded that "company-specific 'do-not-call' requirements [would have] a greater measure of success" with charitable organizations. *Id.* at 4637. The FTC also acknowledged that advocacy was inherent in charitable solicitations, and thus, such solicitations might be entitled to a greater degree of First Amendment protection. *Id.* at 4634-4636. Nonetheless, the FTC concluded that telemarketing on

behalf of charitable organizations should be regulated to some degree because such calls interfere with residential peace. *Id.* at 4637. Accordingly, the FTC required charitable telemarketers calls within its jurisdiction—that is, for-profit telemarketers acting on behalf of a charitable organization—to comply with the company-specific requirement. *Ibid.* It further provided that it would revisit this issue if the company-specific rule failed to protect consumer privacy in this context. *Ibid.*

d. *The 2003 Consolidated Appropriations Resolution and Do Not Call Implementation Act and the FTC's and FCC's implementing regulations*

Shortly after the FTC promulgated its do-not-call registry regulations, Congress enacted the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 96, and the Do-Not-Call Implementation Act (DNCIA), Pub. L. No. 108-10, § 2, 117 Stat. 557. The first act permits the FTC to collect up to $18.1 million in fees "to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule." 117 Stat. 96. The second authorized the FTC to collect fees "sufficient to implement and enforce the provisions relating to the 'do-not-call' registry of the Telemarketing Sales Rule." § 2, 117 Stat. 557. The FTC subsequently promulgated a fee rule under which a telemarketer may access for 12 months the names of do-not-call consumers in up to five area codes for free but charges $25 per area code thereafter, with a maximum fee of $7375.[3] *Final Fee Rule*, 68 Fed. Reg. 45,141, 45,144 (2003). Entities that are not required to

[3] On April 30, 2004, the FTC published a notice of proposed rulemaking to raise this fee to $45 per area code. See 69 Fed. Reg. 23,701.

comply with, but voluntarily honor, the do-not-call regulations may access the registry free of charge. *Id.* at 45,144.

On June 27, 2003, the FTC opened the registry for consumer enrollment. Within 72 hours, consumers had registered more than 10 million telephone numbers on the registry. FTC Press Release, *Do Not Call Registrations Exceed 10 Million* (June 30, 2003) <http://www.ftc.gov/opa/2003/06/dncregistration.htm.>.

On July 3, 2003, the FCC revised its regulations pursuant to the DNCIA, and also established a national do-not-call registry. See Report and Order, 18 F.C.C.R. at 14,017 para. 1. Like the FTC, the FCC concluded that such a registry was needed due to the substantial rise in telemarketing calls and the increasing use of computerized predictive dialers. *Id.* at 14,017 para. 2. As a result of these changes, the company-specific requirement had become a burden "on the elderly and individuals with disabilities" who had to repeat their do-not-call requests to every telemarketer. *Id.* at 14,030 para. 19; *id.* at 14,054 para. 66. The FCC emphasized that the registry would include only "the telephone numbers of consumers who indicate that they wish to avoid such calls," and that "[c]onsumers who want to receive such calls may instead continue to rely on the company-specific do-not-call lists to manage telemarketing calls into their homes." *Id.* at 14,018 para. 3.

The national do-not-call registry has grown in popularity. As of June 2004, 62 million phone numbers had been entered on the registry. See FTC Press Release, *National Do Not Call Registry Celebrates One-Year Anniversary* (June 24, 2004) <http://www.ftc.gov/opa/2004/06/dncanny.htm> (June 24 Press Release).

e. *Ratification of the FTC's do-not-call rule*

On September 23, 2003, the District Court for the Western District of Oklahoma held that the FTC lacked statutory authority to establish a do-not-call registry. *U.S. Security* v. *FTC*, 282 F. Supp. 2d 1285 (W.D. Okla.). In response to that decision, Congress enacted and the President signed into law Public Law Number 108-82, which expressly recognizes the FTC's statutory authority to promulgate a do-not-call registry and "ratif[ied]" the FTC's existing do-not-call regulation.[4]

2. *Proceedings Below*

a. *The district court proceedings*

After the FTC published its do-not-call registry regulations, petitioners commenced two related actions, one challenging the FTC's regulations and the other challenging the FCC's regulations, on First Amendment (and other) grounds.

In the first action, the United States District Court for the District of Colorado enjoined implementation of the FTC's national do-not-call registry regulations on the ground that the regulations violate the First Amendment. Pet. App. 106a. The court recognized that the registry merely provides "a mechanism by which the individual can choose to ban all commercial telemarketing calls to his residence," *id.* at 95a, that the government's interest in protecting residential privacy and tranquility "is of the highest order in a free and civilized society," *id.* at 99a, and that the registry would block a "substantial amount of unwanted calls." *Id.* at

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[4] In the decision below, the court of appeals reversed the judgment in *U.S. Security*. Pet. App. 36a-37a. The plaintiffs in that case, however, have not sought this Court's review of the decision. See Pet. 9 n.2.

101a. Nonetheless, the court concluded that the registry could not satisfy the standards for regulating commercial speech established in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Specifically, the district court concluded that the FTC's regulations did not "materially advance" the government's interest in protecting residential privacy, because charitable telephonic solicitations were exempted from the regulations' scope. Pet. App. 100a-106a. Accordingly, the district court enjoined the regulations. On the FTC's motion, the Tenth Circuit entered a stay of the injunction pending appeal. *Id.* at 39a-57a.

In their second action, petitioners filed a petition for review and an application for stay of the FCC's regulations directly with the Tenth Circuit, arguing the regulations violated the First Amendment. The Tenth Circuit denied the stay application, and Justice Breyer subsequently denied an application to this Court to stay the implementation of the FCC's rules.

b. ***Proceedings before the Tenth Circuit***

The Tenth Circuit consolidated the two actions and rejected petitioners' First Amendment challenges in a unanimous decision. Pet. App. 1a-38a. The court of appeals concluded that the registry "directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech" "by effectively blocking a significant number of calls that cause the problems the government sought to redress." *Id.* at 4a, 15a; see *id.* at 19a (noting that the legislative record and the telemarketers' own estimates demonstrate that a substantial

share of all solicitation calls will be covered by the do-not-call registry).

The court also concluded that the registry was narrowly tailored to advance these interests because it "prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls." Pet. App. 22a; see *id.* at 15a (the registry's "opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener"). Consumers who wish to receive telemarketing calls may refrain from entering their name on the registry, while those who wish to receive select calls may rely on the company-specific requirement or the exemption to the nationwide registry for calls made with the consumer's permission. *Id.* at 25a.

The court rejected petitioners' contention that the company-specific requirement was adequate to protect consumers, noting that the record "overwhelmingly" demonstrated the opposite. Pet. App. 25a. The court also rejected petitioners' claim that the registry was fatally underinclusive because it excluded charitable and political solicitations, holding that "the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front." *Id.* at 15a (citing *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993)). The court of appeals distinguished this Court's decision in *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417-418 (1993), which held that a municipality could not prohibit the placement of only commercial newsracks on public property, reasoning that the regulation at issue in that case was so underinclusive, it was irrational and failed to advance materially the asserted governmental interests. Pet. App. 15a-18a, 27a-28a. The do-not-call registry regulations, however, prohib-

ited a substantial number of unwanted solicitations and were not "ineffective." *Id.* at 18a. The court added that "Congress, the FTC and the FCC ha[d] all determined" that "commercial calls" were the "most to blame for the problems the government is seeking to redress" (*id.* at 20a), and the FTC had found "that commercial callers are more likely than non-commercial callers to engage in deceptive and abusive practices." *Ibid.*

Finally, the court of appeals disagreed with petitioners' argument that the FTC's fee rule was unconstitutional. These fees were statutorily authorized as necessary "to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement." Pet. App. 31a (quoting Pub. L. No. 108-10, § 2, 117 Stat. 557). Such fees to defray the cost of a legitimate regulation, the court observed, had long been recognized as constitutionally valid. *Id.* at 30a-31a (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941)).

ARGUMENT

The decision below is consistent with this Court's precedents and the decisions of other courts of appeals. Further review by this Court is therefore not warranted.

I. *The Do-Not-Call-Registry Regulations Satisfy The Standards For Regulating Commercial Speech Established In* Central Hudson.

1. Review by this Court is unnecessary because the court of appeals' decision is correct. Indeed, the do-not-call registry regulations differ significantly from the kinds of laws typically at issue in First Amendment cases, because they do not establish a government-im-

posed ban on speech that some members of the public might want to hear. See Pet. 16, 21. The regulations establish a framework to enforce *consumers'* own choices about commercial speech and telephone privacy in their homes. See 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)). Absent consumer action—specifically, a consumer directive not to be called—commercial telemarketers are free to place honest and non-abusive solicitation calls. This Court's precedents establish, moreover, that Congress may "permit[] a citizen to erect a wall" that "no advertiser may penetrate without his acquiescence." *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 738 (1970). "[N]o one has the right to press even 'good' ideas on to an unwilling recipient." *Hill* v. *Colorado*, 530 U.S. 703, 718 (2000) (quoting *Rowan*, 397 U.S. at 738).

2. Understood in this manner, the do-not-call registry regulations easily satisfy the standard this Court established in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, lawful commercial speech may be regulated if "the asserted governmental interest is substantial," "the regulation directly advances the governmental interest asserted," and the regulation "is not more extensive than is necessary to serve that interest." *Id.* at 566.

The government's interest underlying the regulations, protecting home privacy and tranquility, is substantial. *Central Hudson*, 447 U.S. at 564. As this Court has recognized, "protecting the well-being, tranquility, and privacy of the home" is "of the highest order in a free and civilized society." *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey* v. *Brown*, 447 U.S. 455, 471 (1980)).

In addition, the registry directly advances those interests. See *Central Hudson*, 447 U.S. at 564. Eighty-seven percent of those consumers registered in the do-not-call database report receiving fewer telemarketing calls, specifically an estimated decrease of 24 calls per month. June 24 Press Release, *supra*. Even under petitioners' mistakenly low estimate of the regulations' effectiveness (Pet. App. 101a), the do-not-call registry eliminates 40% to 60% of unwanted calls to registered consumers.[5] Cf. *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993) (upholding a restriction on offending ads that applied only to a radio station that accounted for 11% of listening time in the affected area).

The regulations are also narrowly tailored. *Central Hudson*, 447 U.S. at 564. The do-not-call registry does not ban speech solely through government action but creates "an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers." Pet. App. 5a. As such, it is one of the least restrictive ways to regulate solicitations. See *Ashcroft* v. *American Civil Liberties Union*, 124 S. Ct. 2783, 2792 (2004) (observing that software filters may be less restrictive manner of regulating online pornography than direct government regulation because filters allowed choice at "end" rather than "source" of pornographic materials).

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[5] This estimate was based on testimony before the FTC by individual sellers and telemarketers, indicating they might have to lay off up to 50% of their employees if the registry went into effect. See 68 Fed. Reg. at 4631. The estimate does not reflect the impact of the FCC's rule, which fills substantial gaps in the FTC's jurisdiction by covering intrastate telemarketing as well as telemarketing by banks, common carriers, and other institutions.

3. Contrary to petitioners' claim (Pet. 2-3), the government's interests would not be effectively served in a less restrictive manner by relying solely on a company-specific requirement. Indeed, the FTC and FCC tried that approach, but it failed. As the record demonstrates, the company-specific requirement was burdensome to consumers, particularly the elderly and disabled (Pet. App. 25a (quoting 68 Fed. Reg. at 4631)); commercial solicitors ignored consumers' requests not to be called (*id.* at 26a (citing 68 Fed. Reg. at 4629)); and consumers could not verify that their numbers had been removed from a solicitor's calling list or prove that their requests had been disregarded. *Ibid.*

In any event, Congress is not consigned to responding to a serious problem in a manner that is less restrictive only at the expense of being significantly less effective. Rather, a law is narrowly-tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation," whether or not it is the "least intrusive" means of serving the government's interests. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)).

4. In all events, this Court's review of this question is unnecessary to resolve any split of authority among the courts of appeals. There is no dispute that the courts of appeals have uniformly upheld FTC and FCC regulations empowering consumers to limit the telemarketing calls they receive. As the Tenth Circuit recognized (Pet. App. 29a n.13), every court of appeals that has considered constitutional challenges to such restrictions on commercial telemarketing has rejected the challenge. See *Missouri* v. *American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003) (upholding TCPA provisions barring unsolicited commercial fax advertis-

ing), cert. denied, 124 S. Ct. 1043 (2004); *Destination Ventures, Ltd.* v. *FCC*, 46 F.3d 54 (9th Cir. 1995) (same); *Moser* v. *FCC*, 46 F.3d 970 (9th Cir.) (upholding TCPA ban on prerecorded commercial telemarketing), cert. denied, 515 U.S. 1161 (1995).

II. *The Do-Not-Call Registry Regulations Are Not Unconstitutionally Underinclusive.*

1. Petitioners are equally incorrect in arguing that the do-not-call registry regulations are unconstitutionally underinclusive because they do not apply to charitable or political solicitations. Pet. 17-22. This argument is based on a misreading of this Court's decision in *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993).

In *Discovery Network*, the City of Cincinnati prohibited the placement of only commercial newsracks on public property to promote aesthetic considerations and public safety. 507 U.S. at 414. As a result of this regulation, 62 newsracks, of some 1500 to 2000 on public property, were cleared from public land. See *id.* at 414, 418. This Court held the Cincinnati ordinance unconstitutional. Observing that any benefit from Cincinnati's regulation would be "minute" and "paltry," *id.* at 417-418, the Court concluded that the city's stated interests in aesthetics and safety could not justify "the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, *and* have only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418. *Discovery Network* thus held that "a regulation that has only a minimal impact on the identified problem cannot be saved simply because it targets only commercial speech." Pet. App. 28a.

In sharp contrast to the ordinance at issue in *Discovery Network*, the do-not-call registry regulations eliminate the primary, indeed overwhelming, source of unwanted telephone solicitations. See Pet. App. 20a, 29a; see also, *e.g.*, H.R. Rep. No. 317, 102d Cong., 1st Sess. 16 (1991) ("[c]omplaint statistics show[ed] that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations") (citing poll conducted by National Association of Consumer Agency Administrators). While petitioners may disagree (Pet. 16) with the consumers who expressed their dissatisfaction with only commercial telemarketing to the FTC and FCC, that disagreement is not a basis for this Court's review.

2. In addition, petitioners err in suggesting (Pet. 18-22) that *Discovery Network* requires the government to treat commercial and non-commercial speech identically when responding to a problem caused primarily by commercial entities. To the contrary, this Court does not "require that the Government make progress on every front before it can make progress on any front. * * * [T]he Government may be said to advance its purpose by substantially reducing [a public harm], even where it is not wholly eradicated. *Edge Broad. Co.*, 509 U.S. at 434. Addressing problems related to commercial solicitation before charitable solicitation is rational, moreover, because "charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services." *Village of Schaumburg* v. *Citizens for a Better Env't* 444 U.S. 620, 632 (1980).

3. Petitioners' call (Pet. 17-22) for the Court to clarify *Central Hudson* in light of its decision in *Discovery Network* is inappropriate here, as this case

would be a poor vehicle to consider that issue. Some members of this Court have suggested that a stricter standard than the one announced in *Central Hudson* should apply to regulations that ban speech for "paternalistic" reasons. See *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 367-368 (2002); *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in the judgment). But the do-not-call registry regulations reflect a distinctly non-paternalistic approach to a serious problem. Indeed, far from adopting a paternalistic approach, the regulations empower consumers to decide what information they will hear. Accordingly, this case is not the appropriate vehicle for determining any limits to *Central Hudson*.

4. Contrary to petitioners' claim (Pet. 21-22), there is no conflict among the courts of appeals over the "proper application" of this Court's decision in *Discovery Network* that would nonetheless justify this Court's review. *Ibid.* In every case petitioners cite for this proposition (*ibid.*), the courts acknowledge and agree on the legal principle governing this case: the government can ban commercial speech, and not noncommercial speech, if doing so effectively serves the governmental interest. See *Rappa* v. *New Castle County*, 18 F.3d 1043, 1065 (3d Cir. 1994) ("The state can exempt from a general ban speech having [a particular] content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as * * * the exception is substantially related to advancing an important state interest."); *Pearson* v. *Edgar*, 153 F.3d 397, 403 (7th Cir. 1998) (recognizing that government could adopt limited ban on speech so long as it demonstrated a "reasonable fit"

between the ban and the government's interest); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (observing that "[i]n light of [their] differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment"); *Outdoor Sys., Inc.* v. *City of Mesa*, 997 F.2d 604, 611 (9th Cir. 1993) (upholding municipal code provisions that distinguished between types of commercial speech on the ground that "there is a reasonable fit between the sign codes and the interests they seek to achieve"). Thus, there is no meaningful difference in the courts of appeals' application of *Discovery Network* with respect to the relevant legal principle here.

5. The different outcomes in these cases, moreover, are due to the different regulations and different evidentiary records before the courts, not differences in the application of *Discovery Network*. The statute invalidated by the Third Circuit in *Rappa*, 18 F.3d at 1047, for example, banned a challenger's political campaign signs while allowing commercial signs without justification for the difference in treatment between the signs. In *Pearson* v. *Edgar*, the Seventh Circuit invalidated a mechanism that allowed homeowners to reject real estate solicitation but not other forms of solicitation, in the absence of any evidence that "real estate solicitation harms or threatens to harm residential privacy." 153 F.3d at 404. The city codes in *Outdoor Systems, Inc.*, 997 F.2d at 611, "distinguish[ed] among types of commercial speech—onsite and offsite —but as between commercial and noncommercial speech [were] neutral." Finally, in *Action for Children's Television* v. *FCC*, *supra*, the D.C. Circuit did not consider commercial speech at all, but invalidated a

statute that carved out a limited exception to a general prohibition on the radio and television broadcast of indecent material before midnight.

Here, the record before the Tenth Circuit amply supported its conclusion that some distinction between commercial and non-commercial telemarketing was warranted. See Pet. App. 17a-21a. To the extent petitioners disagree with the Tenth Circuit's reading of the record or the weight it assigned to various findings by the FTC and FCC, petitioners seek review of only fact-bound issues that do not merit this Court's review.

III. *The FTC's Fee Rules Are Constitutionally Permissible.*

1. Petitioners' separate challenge to the FTC's fee rules does not merit this Court's review for the same reasons. The lower court's conclusion that the fee rules are constitutional is correct. Under the Do-Not-Call Implementation Act, Pub. L. No. 108-10, § 2, 117 Stat. 557, the FTC is authorized to spend fees "to implement and enforce the provisions relating to the 'do-not-call' registry." Pet. App. 31a. As the court of appeals explained, fees collected to defray the cost of legitimate regulation present no First Amendment problem. *Id.* at 30a-33a.

Petitioners assert (Pet. 29) that fee revenue may not, consistent with constitutional requirements, be used to upgrade the FTC's Consumer Sentinel System. As the FTC has explained, however, the upgrade was needed to enable it to accommodate both the enormous volume of complaints the FTC anticipated the registry would generate and the demand from state law enforcers for access to those complaints. See June 24 Press Release, *supra*; *Final Fee Rule*, 68 Fed. Reg. 45,141 (2003) (Pet. App. 143a). This use of fees is plainly consistent with

this Court's precedent. See *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

2. In addition, petitioners have failed to identify any conflict of authority on this issue, and there is no conflict that would merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

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I. The Opposition Does Not Address the Important Doctrinal Issue Presented

1. The Government's Opposition avoids entirely the primary doctrinal issue presented: Whether the First Amendment permits the government to impose regulations that discriminatorily restrict commercial speech in order to serve an asserted interest unrelated to the commercial nature of the speech. The answer to this question determines whether the intermediate scrutiny of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), even applies – a conclusion the government simply assumes. Brief for the Respondent in Opposition ("Opp.") at (i), 13-17. Rather than addressing the issues set forth in the Petition, the government mischaracterizes them, claiming that Petitioners argue only that the national "do-not-call" registry ("DNCR") is fatally underinclusive. Opp. 12, 17. It acknowledges that various Members of the Court have questioned *Central Hudson's* "paternalism," Opp. 19, which, of course, is true, but entirely beside the point. The issue here is not the well-settled matter of "paternalism," nor is it simply whether the rules are underinclusive. The issue is the government's effort to hide behind *Central Hudson's* relaxed scrutiny by "distinguish[ing] among the indistinct." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 195 (1999).

Members of this Court frequently have questioned whether "regulations not directed at the content of commercial speech or adverse effects stemming from that content should be evaluated under the standards applicable to regulations of fully protected speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 436 (1993) (Blackmun, J., concurring); *id.* at 416 n.11 ("a regulation that is not . . . directed [at commercial harms] should be evaluated under the standards applicable to regulations on fully protected speech"). As Justice Stevens described the decision in *Discovery Network*, the Court invalidated a ban that "attached too much importance to the distinction between commercial and noncommercial speech" because the interest served "bore no relationship whatsoever to the prevention of *commercial harms*." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 n.12 (1996) (plurality op.) (emphasis added). *See also id.* at 499, 504 (advertising restrictions that do not protect consumers from

"commercial harms" must be scrutinized with "special care" and "rarely survive constitutional review"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491-492 (1995) (Stevens, J., concurring) ("the 'commercial speech doctrine' is unsuited to this case, because [the law] neither prevents misleading speech nor protects consumers from the dangers of incomplete information"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (Kennedy, J., concurring) (*Central Hudson* "gives insufficient protection to truthful, non-misleading commercial speech"); *id.* at 576 (Thomas, J., concurring) (whatever the continuing validity of *Central Hudson*, "it is limited to the peculiarly *commercial* harms that commercial speech can threaten") (emphasis in original). *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (regulation within categories of speech that receive limited First Amendment protection is restricted to the reason why such speech is constitutionally proscribable). [1]

This question was fully briefed, Pet. 17-22, but was met with silence from the government. So, too, did the Opposition ignore the fact that the cases analyzing restrictions on unwanted communications have nothing at all to do with commercial speech. *Id.* at 14-17. If anything, the government unwittingly supports Petitioners' argument on this point by citing noncommercial speech cases to substantiate its "overriding interest" in protecting privacy. Opp. 14 (citing *Hill v. Colorado*, 530 U.S. 703 (2000) (abortion protest); *Frisby v. Schultz*, 487 U.S. 474 (1988) (residential picketing); *Carey v. Brown*, 447 U.S. 455 (1980) (labor picketing)). Yet despite the complete absence of any distinctly "commercial" interest, the Opposition continues to justify its discriminatory rules based on heightened constitutional protection for noncommercial and political speech. Opp. 7, 18.

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[1] The Opposition's claim that circuit courts consistently read *Discovery Network* only as a case on underinclusiveness is wrong. *Compare* Opp. 19-20, with *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998) (citing *Discovery Network* to invalidate discriminatory solicitation ban after first upholding it); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (citing *Discovery Network* to strike down discriminatory broadcast regulation); *Rappa v. New Castle County*, 18 F.3d 1043, 1079 (3d Cir. 1994) (invalidating sign law because it "impermissibly discriminates").

2. The government's unwillingness to address the central constitutional issue is highlighted by its characterization of the "commercial speech" problem as nothing more than a simple empirical question. It presents the DNCR not as a remedy for asserted harms of commercial speech, but instead as a response "to a problem caused primarily by commercial entities." Opp. 18. Framing this issue in this way underscores the government's internal contradictions as well as the stark deficiencies in the record, regardless of whether this Court applies strict scrutiny or *Central Hudson's* intermediate test.

The government acknowledges that noncommercial calls involve precisely the same "intrusion" issues as commercial calls, and even defends other new regulations by citing this fact. A brief to the United States Court of Appeals for the Fourth Circuit (ironically filed *the same day* as the Opposition), in which the government defended the application of company-specific "do-not-call" rules to professional charitable fundraisers, notes that the FTC "concluded during the rulemaking, based on the administrative record, that consumers' privacy rights are infringed by telemarketing calls seeking charitable contributions: '[C]onsumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution . . . A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.' 68 Fed. Reg. at 4637 & n.685."[2] This point was reinforced by various members of Congress when they authorized funding for the DNCR.[3]

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[2] Brief of Defendant-Appellee Federal Trade Commission, *National Fed'n of the Blind v. FTC*, No. 04-1378 (4th Cir., filed July 19, 2004) at 45. The record before the agencies and such arguments before other tribunals rest uncomfortably with the government's representations to this Court regarding "consumers who expressed their dissatisfaction with *only* commercial telemarketing to the FTC and FCC." Opp. 18 (emphasis added).

[3] Do Not Call List Authorization Hearing, Jan. 8, 2003 at 7. *See also id.* at 32 (statement of Chairman Tauzin) ("I personally am offended by all the recorded calls from politicians ... I know a lot of folks who are tired of hearing [these] messages"); *id.* at 8 (statement of Rep. Cox) ("there is no

Notably, Congressman Tauzin pointed out with respect to the exemptions, that if consumers "still get political solicitations [and] nonprofit solicitations ... during the so-called dinner hour ... my suspicion is that [they] would think that the legislation was a fraud." *Know Your Caller Act Hearing* at 76.

There is zero difference in the nature of an intrusion caused by different types of calls, and the government's conclusion that the problem is "caused primarily by commercial entities" depends on asserted facts that neither the FTC nor FCC attempted to gather. The FCC declined even to request comments on the extent of problems caused by political, charitable, or religious calls, *FCC NPRM* at 1748-49, App. 893a-94a, despite its earlier finding that "all solicitation calling – whether for charitable, political, or business purposes – involves similar privacy implications," *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980), and notwithstanding a congressional directive to study the issue. 47 U.S.C. § 227(c)(1)(D). For its part, the FTC frankly admitted there was no evidence in the record regarding the relative quantity of commercial versus noncommercial calls, and based its subsequent defense on this point entirely on industry estimates (which the agency disputed) of how much business would be lost under the DNCR. *See Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 284 F.Supp.2d 1266, 1269 (D. Colo. 2003) ("[t]here is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's *ipse dixit*"). App. 65a. *See also* Do Not Call List Authorization Hearing, Jan. 8, 2003 at 34-35 (FTC admitted that it conducted no "studies or surveys" to determine which calls consumers find most annoying).[4]

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reason to grant preferred status to political calls, which are often the most annoying of all"); *id.* at 4 (statement of Rep. Barton) (registry should include political and charitable calls); *id.* at 30 (statement of Rep. Deal) (people will continue to get calls that bother them).

[4] Although the government does not suggest directly that the DNCR was enacted to address the issue of fraud, it does refer to the Tenth Circuit's erroneous conclusions on this point. Opp. 13. *But see* Pet. 12-13. However, any claim that commercial callers are more likely than non-commercial callers to engage in abusive behavior is undermined by the

With no evidence in the current record, the government bases its claim that commercial calls are the "overwhelming" source of unwanted telephone solicitations on a single reference in the 1991 House Report on the TCPA. Opp. 18. That one data point has proven so popular that the government cited it six times in its brief to the Tenth Circuit, [5] which in turn quoted it at least three times in its decision. *Mainstream Marketing Servs., Inc. v. Federal Trade Comm'n*, 358 F.3d 1228, 1235, 1240, 1241 (10th Cir. 2004). But the information in the House Report was never intended to carry the weight that the government now places on it. Congress collected information on complaints only from a handful of states (from a time before "do-not-call" laws existed), yet still concluded that charitable or political calls can "represent as serious a problem as commercial solicitations." [6] On that basis, it adopted "a special requirement" directing the FCC to monitor whether political and other noncommercial calls might require a future regulatory response. H. Rep. 102-317 at 16-17. Here, however, the FCC instructed commenters not to submit information on this point, *FCC NPRM* at 17478-79, App. 893a-94a, despite the fact the rulemaking proceeding was predicated on the need to account for "significant changes" in

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government's own previous representations to this Court. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003), 2002 WL 31907178, at *8 (detailing examples of abuse and "misrepresentations ... typical of the charitable solicitation frauds that the federal government prosecutes").

[5] Consolidated Opening Brief of the Government, *Mainstream Marketing Services, Inc. v. FTC*, No. 03-1429 (10th Cir., filed Oct. 17, 2003) at 6, 7, 26, 46, 47, 48.

[6] H. Rep. 102-317 at 16-17. The survey described in the House Report collected only "readily available" data from thirteen states, and reported specific findings on nine. In the remaining four states (New York, Nevada, Tennessee, and Washington), the survey concluded that calls were "mostly commercial," without disclosing whether the percentage was just over fifty percent or some higher proportion. Nor did it disclose how the term "commercial" was defined, or whether it corresponded to the categories set forth in the TCPA.

telemarketing since 1992. *FCC Order* at 14017. App. 590a. As a result, even if the government legitimately could convert the commercial speech issue from a doctrinal question involving speech classifications into a matter of pure empiricism, its failure in this case to seek updated data conflicts with this Court's most recent First Amendment jurisprudence requiring a reasonably current administrative record. *Cf. Ashcroft v. ACLU*, 124 S. Ct. 2783, 2794 (2004) (five-year-old findings in a rapidly changing area of technology considered inadequate to support First Amendment restrictions).

3. The government also ignores the fundamental problem of defining what speech qualifies as "commercial" and therefore subject to the more relaxed scrutiny of *Central Hudson*. *See Nike v. Kasky*, 539 U.S. 654 (2003). Pet. 20-21. It never attempts to correlate its claims that "commercial entities" cause most of the problems of unwanted calls with the exemptions and exclusions enforced by the DNCR or with the agencies' findings. The rules permit nonprofit entities to make sales calls but prohibit commercial speakers from making calls that do nothing more than promote their corporate image. *See* 16 C.F.R. §§ 310.2(bb), (cc), 310.4(b)(1)(iii)(A), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), (f)(6)-(7), (f)(9)(iii). Similarly, commercial callers may continue to call established customers, 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii); 47 C.F.R. § 64.1200(c)(2), (f)(9)(ii), while competitors in the same line of business may not make calls seeking new customers. 16 C.F.R. § 310.4(b)(1)(iii)(B); 47 C.F.R. § 64.1200(c)(2). It is a mystery how these distinctions correlate with the government's "findings" regarding the problems of commercial versus noncommercial telemarketing calls, [7] but they confirm that the commercial speech doctrine, which focuses on the specific nature of the speech to be regulated and its commercial effects, is ill-suited to cabin the arbitrary categories imposed by the DNCR.

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[7] The only study the FTC cited found that consumer preferences did not so much focus on whether the caller was commercial or noncommercial, but on whether it was local or community-based. *FTC Order* at 4593 (citing Michael A. Turner, *Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices* (Information Policy Institute, June 4, 2002)).

4. Just as it avoids the doctrinal questions, the government also misconstrues this Court's seminal holding regarding unwanted speech in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970). It tries to frame the question as a commercial speech issue by equating "commercial" with "unwanted" communications and claiming the DNCR blocks unwanted calls only at the consumer's request. Opp. 14. *See also id.* 12, 15, 19. But this utterly ignores the Petition's discussion of *Rowan*, which explained that this Court has invalidated restrictions where the government, not the individual, decides the categories of speech to be blocked, even in "opt-in" systems. Pet. 15-16. As the District Court found below, the mail regulations upheld in *Rowan* operate like the company-specific "do-not-call" rules because they leave entirely to the individual the choice of which communications to block, while the DNCR bans only categories of speakers selected by government fiat. *See Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 283 F.Supp.2d 1151, 1163 (D. Colo. 2003). App. 98a.

The government's failure to recognize this crucial distinction is well illustrated by its reliance on *Ashcroft v. ACLU*, 124 S. Ct. 2783, in which this Court observed that the voluntary use of Internet filtering software is less restrictive than direct regulation of content. Opp. 15. While it is undeniably true that a private decision to install filtering software in the home is less burdensome than a ban on speech, it does not follow that the First Amendment would allow the government to decide which websites must be blocked or permitted, even if the filters are installed voluntarily. And so it is with the DNCR. A consumer may decide whether or not to sign up for the registry, but it is the government that has chosen which calls are prohibited and which ones allowed. Such an approach is fundamentally incompatible with *Rowan*. 397 U.S. at 737 (opt-in system was designed "not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official").

II. The Opposition Misconstrues *Central Hudson*

1. Even if the DNCR is properly subject to *Central Hudson* intermediate scrutiny, review by this Court is needed because of the extent to which the Tenth Circuit misconstrued this Court's commercial speech jurisprudence. Although the Petition clearly articulated this issue, Pet. 23-28, the Opposition failed to respond directly or address this Court's most recent and relevant cases. Ignoring *Rubin* and *Greater New Orleans Broadcasting Ass'n.*, the Opposition, like the Tenth Circuit below, relies almost entirely on this Court's decision in *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993). Opp. 12, 15. However, contrary to the government's claim, *Edge* did *not* hold that an 11 percent reduction in "undesirable speech" is sufficient to show "material advancement" under *Central Hudson*. Pet. 22-26. *See Edge Broad. Co.*, 509 U.S. at 427-428 (lower courts "asked the wrong question"). As this Court subsequently explained in *Greater New Orleans Broadcasting*, 527 U.S. at 194-195 & n.8, the regulation in *Edge Broadcasting* was upheld only because the government interest in that case was limited to "supporting" state lottery laws. But where the government's purpose is reducing the total number of "undesirable" commercial communications – as it is here – arbitrary exemptions from coverage are fatal. *Id.* at 192-193; *Rubin*, 514 U.S. at 489. In this case the government has admitted it has no idea what proportion of unwanted calls the DNCR may prevent. [8] The dispute here is not just about the Tenth Circuit's evaluation of the factual record as the government asserts, Opp. 21; it is about that court's basic misreading of *Central Hudson*.

2. The government also misconstrues *Central Hudson's* narrow tailoring requirement, ignoring this Court's latest statement

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[8] 358 F.3d at 1240 n.11. App. 18a. Lacking record support, the government now cites an FTC press release celebrating the DNCR's first anniversary which quotes third-party public opinion polls. Opp. 15. No information is provided regarding how the polls were conducted and no explanation is offered as to why such data should be permitted to supplant missing record evidence. *See Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality op.) (declining invitation "to rest constitutional law on such uncertain foundations" as public opinion polls).

regarding less restrictive means in *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002). Consumers have a range of alternatives to block unwanted calls, including voluntary measures initiated by industry, market-based solutions, and less restrictive regulations. Contrary to the government's claim, Petitioners have never relied "solely" on company-specific "do-not-call" rules to protect consumers' interests. Opp. 16. *See* Pet. 28 (listing other less restrictive regulations).

Throughout the rulemaking proceedings, Petitioners explained that the TCPA was predicated on the assumption that no market-based blocking solutions existed to address concerns over telemarketing, Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991), but since its passage a range of technology-based alternatives evolved to give individuals a great deal of choice about the type and volume of calls they receive. Such measures include inexpensive hardware that consumers can install to block unwanted calls, as well as network-based services, such as Caller ID, that the new rules support. 16 C.F.R. § 310.4(a)(7); 47 C.F.R. § 64.1601(e). This Court recently found that such market-based measures can be more effective than regulation because they are not limited in their application to the categories set forth in the law. *Ashcroft*, 124 S. Ct. at 2792-93. Other less restrictive rules, such as the regulations governing predictive dialers, further undermine justifications for the DNCR.[9]

The government's claim that the company-specific rules "failed" overlooks the fact that almost no consumers knew they existed and the agencies never publicized or enforced them. Pet. 4-5, 27-28. Additionally, its conclusion that company-specific rules are excessively "burdensome" is not supported by the record. The government asserted without support in its briefs below that each consumer would be required to make "thousands" of individual requests, but the Tenth Circuit observed that the actual number

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[9] 16 C.F.R. § 310.4(b)(1)(iv); 47 C.F.R. § 64.1200(a)(5)-(6). The FCC estimated that 41 percent of all telemarketing calls were "abandoned calls" placed by predictive dialers. App. 597a n.28.

amounts to an average 2.64 calls per week to each household.[10] This number, however, represents all telemarketing calls, including abandoned calls and calls from political and charitable sources. The record before the agencies indicated that the "burden" is closer to one request per week, which is hardly unreasonable. Pet. 27-28 n.15. Petitioners also advocated additional measures to bolster such rules, such as allowing consumers to sign up and verify compliance online or by using toll-free numbers. *See FCC Order* at 14068. App. 679a. The government's failure to seriously consider such less restrictive measures cannot be reconciled with its obligations under the First Amendment. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 758-759 (1996).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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[10] 358 F.3d at 1240, App. 18a. The Court concluded that company-specific rules are too burdensome, but did so by aggregating the total number of requests by all consumers for all calls in the U.S. on an annual basis. The more appropriate measure, however, is whether a given consumer can block calls he or she does not want, as in *Rowan*.